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CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~402~~ 15

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON

vs.

H. G. SEABORN

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED NOVEMBER 26, 1929

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 492

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON

vs.

H. G. SEABORN

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Certificate from U. S. C. C. A., Ninth Circuit	1	1
Statement of case	1	1
Questions certified	3	2
Judges' signatures	4	3

83191—29

1 In United States Circuit Court of Appeals for the Ninth Circuit

BURNS POE, COLLECTOR OF INTERNAL REVENUE for the District of Washington, appellant
vs.
H. G. SEABORN, APPELLEE
No. 5885.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER SECTION 239 OF THE JUDICIAL CODE

Filed Nov. 18, 1929

Statement of case

H. G. Seaborn and Charlotte A. Seaborn are husband and wife and both are citizens of the United States. They have maintained their domicile in the State of Washington at all times since their marriage December 11, 1902, and all property, real and personal, now owned by them, including the income hereinafter mentioned, is, and during the year 1927 was, their community property under the laws of that State. During that year the gross income of the community amounted to the sum of $38,448.17, and, after making the deductions allowed by law, the husband and wife made separate returns of this community income, each reporting substantially one-half thereof. All taxes due and payable on these returns have been fully paid, and it is admitted that all income taxes due from either husband or wife for the year 1927 were fully paid on these separate returns, if as a matter of law they had a lawful right to make such separate returns under section 210 of the revenue act of February 26,
1926, which provides that a certain tax shall be levied, col-
2 lected, and paid for each taxable year upon the net income of every individual. 44 Stat. 21; 26 U. S. C. A. sec. 2012. The collector of internal revenue for the district of Washington, for the purpose of making a test case, refused to accept the separate returns thus made by the husband and wife and made a reassessment, imposing the tax on the husband alone for the entire income of the community for that year. The husband paid the additional tax thus imposed under protest and has taken all steps required by law to enable him to maintain an action against the collector of internal revenue for the recovery of the additional tax thus imposed and collected. The present action was thereupon instituted by the husband to recover the difference between the amount of the tax as reassessed and paid and the amount of the tax if computed on

the separate returns made by the husband and wife. From a judgment in favor of the plaintiff for the amount claimed the United States has appealed.

Section 6890 of Remington's Compiled Statutes of the State of Washington, 1922, defines the separate property of the husband, the next section defines the separate property of the wife, and section 6892 defines community property as follows:

"Property not acquired or owned as prescribed in the next two preceding sections, or acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of the community personal property, with a like power of disposition as he has of his separate property, except that he shall not devise by will more than one-half thereof."

As already stated, it is admitted that the income here involved was the community property of the husband and wife as defined in the latter section. It is the established rule of decision in the highest court of the State of Washington that the wife during the life of the husband, as well as upon a dissolution of the marriage, has a vested and definite interest and title in the community property, real and personal, equal in all respects to the interest and title of
3 the husband therein. Rucker v. Blair, 32 F. (2d) 222. It is likewise the established rule of decision in that State that the power given to the husband of management and control of the community personal property is a naked power in trust for the community. It is not a power coupled with an interest and gives the husband no proprietary right or interest in the one-half of the community property, real or personal, which belongs to the wife. It differs in no respect from an agency created by a general power of attorney or other contract of agency. Holyoke v. Jackson, 3 Wash. Ter. 235; Schramm v. Steele, 97 Wash. 309.

Ever since the year 1920 husbands and wives domiciled in the State of Washington have made separate returns of their community income, each reporting one-half thereof, and taxes have at all times been paid on such returns. This practice has at all times been fully recognized and sanctioned by the opinions of the Attorney General of the United States and by the rulings of the Secretary of the Treasury and other taxing officers of the Government. 32 Opinions of Attorneys General 298, 435. As already stated, an exception was made to the general rule in the present instance for the sole purpose of making a test case.

For a proper decision of the above-entitled cause, now pending on appeal and duly submitted for consideration, instructions are respectfully requested of the Supreme Court on the following important and controlling question of law, concerning which we are in doubt, viz:

Questions certified

First. May a husband and wife domiciled in the State of Washington make separate returns of community income, each reporting

one-half thereof, and pay taxes on such returns, in accordance with the practice which has prevailed in that State for the past eight years under the rulings and sanction of the Attorney Gen-
4 eral, the Secretary of the Treasury and other taxing officers of the Government? Or, putting the question in another form—

Second. Must the husband make return and pay the tax on the entire community income of the husband and wife in that State, as suggested, if not decided by the Supreme Court in United States v. Robbins, 269 U. S. 315?

Dated November 18, 1929.

FRANK H. RUDKIN,
FRANK S. DIETRICH,
CURTIS D. WILBUR,
U. S. Circuit Judges, Ninth Circuit.

[File indorsement omitted.]

A true copy.
Attest, November 18, 1929:
[SEAL.] PAUL P. O'BRIEN, *Clerk.*

[Indorsement on cover:] File No. 34,623. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 492. Burns Poe, Collector of Internal Revenue for the District of Washington, vs. H. G. Seaborn. (Certificate.) Filed November 26, 1929. File No. 34,623.

○

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 15

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON

vs.

H. G. SEABORN

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MAY 26, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 15

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON

vs.

H. G. SEABORN

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Western Washington	1	1
Complaint	1	1
Answer	10	6
Opinion, Cushman, J	13	7
Defendant's requested conclusions of law	24	12
Judgment	26	13
Notice of appeal	27	14
Petition for appeal	28	14
Order allowing appeal	30	15
Assignments of error	30	15
Bill of exceptions and order settling same	34	17
Findings of fact and conclusions of law	38	19
Exhibit A.—Tax return of H. G. Seaborn	49	25
C.—Claim for refund	52	28
B.—Tax return of Charlotte A. Seaborn	53	29
Stipulation and agreed statement of facts	57	32
Præcipe for transcript of record	68	38
Clerk's certificate (omitted in printing)	69	38
Citation and service (omitted in printing)	71	38
Stipulation re printing of exhibits	72	38
Proceedings in U. S. C. C. A., Ninth Circuit	74	39
Order of submission	75	39
Order directing filing of certificate	76	39
Certificate to Supreme Court (omitted in printing)	77	40
Clerk's certificate (omitted in printing)	81	40
Order granting motion to bring up entire record and cause	82	40

120613—30——1

1 In United States District Court for the Western District of Washington, Southern Division

No. 6965

H. G. SEABORN, PLAINTIFF

vs.

BURNS POE, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

2 *Complaint*

Filed Aug. 25, 1928

Comes now H. G. Seaborn, plaintiff above named, and complaining of the said defendant, Burns Poe, for cause of action respectively alleges as follows:

I

That the said plaintiff is and was during all the times herein mentioned a citizen of the United States and of the State of Washington, and resides in Seattle, King County, Washington; that the defendant is and was during all the times herein mentioned the duly appointed, qualified and acting collector of internal revenue for the district of Washington, and resides in Tacoma, Pierce County, Washington, which is in the said southern division of the above-entitled court.

II

That all the acts on the part of said defendant herein complained of were done by him in his official capacity under instructions from his superior officers; that there was probable cause for his said acts and he is entitled to a certificate of probate cause in the event judgment is rendered against him herein.

III

That the plaintiff and his wife, Charlotte A. Seaborn, were married on December 11th, 1902; that the said plaintiff and his said wife have continuously since said date maintained the marriage relation, and have continuously lived in the State of Washington and have been citizens thereof since the 11th day of December, 1902.

3 That neither the plaintiff nor his said wife had any property at the date of their marriage and neither has since acquired any property by gift, devise, or descent.

IV

That by their joint efforts plaintiff and his said wife had accumulated, prior to the year 1927, a considerable amount of property, which consisted of real estate situated in the State of Washington,

stocks and bonds of various corporations, moneys and other personal property; that all of the property so accumulated, as plaintiff alleges and believes, was the community property of the plaintiff and his said wife under the laws of the State of Washington.

V

That in the year 1927 plaintiff was an officer and employe of the Skinner & Eddy Corporation, a Washington corporation, and devoted the major portion of his time to the affairs of said corporation, and in the year 1927 received as a salary for the services so rendered in that year the sum of fifteen thousand ($15,000.00) dollars.

VI

That in addition to the salary mentioned in the foregoing paragraph the plaintiff collected and received in the year 1927 the following income, revenue and profit from the community property aforesaid:

Interest on bank deposits, notes, and corporation bonds	$12,881.06
Dividends on stock of domestic corporations	8,834.57
Profit from the sale of real estate, stocks and bonds	606.59
Profit on sale of boat "Sea Gypsy"	500.00
Profit on Cities Service joint venture	625.95

4 That the sum of above-mentioned items, to wit: $38,448.17, constitutes all of the income received by either the plaintiff and/or his wife in the year 1927.

VII

That plaintiff paid from community funds for the year 1927 the following sums, which he alleges constitute allowable and proper deductions in the calculation of net income, under the Revenue Act of 1926:

Interest paid	$9,097.51
Taxes paid	782.26
Charitable contributions	1,716.68
Earnest money forfeited	250.00

In addition to the foregoing, plaintiff alleges that under revenue act of 1926 a further deduction of $325.00 for bad debts is allowable in the calculation of net income, making a total of allowable deductions of $12,171.45; that the foregoing items of expense and deduction, amounting to the sum of $12,171.45, constitute all of the expenses and deductions allowable to either the plaintiff or his wife in the year 1927.

VIII

That plaintiff and his wife each filed with the defendant herein, in the time required by law, income-tax returns for the year 1927, and made a faithful and bona fide effort to report their said income and

pay the income-tax liability thereon, as required by the revenue act of 1926. In so doing each made a return of one-half the entire amount of income so received as aforesaid, and each deducted therefrom one-half of the expenses and allowances above itemized
5 and each reported and returned, as net taxable income, one-half of the remaining sum. The gross income so returned and reported was $38,448.17; the total deductions and allowances so returned and reported was $12,171.45; leaving a balance of $25,276.72, of which each returned one-half, or $13,138.36 as their respective net incomes.

IX

That the tax liability of the plaintiff upon the income so reported by him at the rates provided by the revenue act of 1926, after giving effect to plaintiff's claim of personal exemption in the sum of $1,750.00 and plaintiff's claim to earned income in the sum of $7,500.00, was $152.38, which plaintiff paid in full at the time required by law. That the tax liability of plaintiff's said wife upon the income so reported by her at the rates provided by the revenue act of 1926, after giving effect to said wife's claim of personal exemption in the sum of $1,750.00 and her claim to earned income in the sum of $5,000.00, was the sum of $168.32, which said wife paid to the defendant at the time required by law.

X

That after the plaintiff had filed his income-tax return for the year 1927, as above set forth, said return was audited and examined by the Commissioner of Internal Revenue, who determined that the plaintiff's said tax was incorrect and that the tax liability shown thereon was insufficient in that, as determined by said Commissioner of Internal Revenue, all of said income, both that reported by plaintiff and that reported by his wife, should have been reported by the plaintiff and the tax calculated at the rates provided
6 for by the revenue act of 1926, upon a net income of $26,276.72 instead of two net incomes of $13,138.36 each. Said commissioner notified the plaintiff by registered mail of this determination, in accordance with section 274 of the revenue act of 1926, and that he proposed to assess against him a deficiency in income tax for the year 1927 on account thereof, amounting to $703.01.

XI

Plaintiff waived the opportunity afforded him to appeal from said determination to the United States Board of Tax Appeals and thereafter, on the 23rd day of August, 1928, the said sum, with interest in the sum of $17.92, a total of $720.93, was assessed against him by said commissioner and the assessment certified to defendant for collection, who thereupon made formal notice and demand upon the plaintiff for the payment of said sum.

XII

That the plaintiff paid to said defendant, on the 23rd day of August, 1928, the sum so demanded of him, and at the time of said payment protested in writing against the collection of said sum and notified the defendant that said sum was paid only to avoid the imposition of a penalty and interest and the seizure and sale of his property, which would result if the said sum was not paid. Thereafter the plaintiff filed with defendant a claim for the refunding of said sum, in the manner provided by law, which claim was based upon the facts and claims herein set forth, and which claim was rejected by the Commissioner of Internal Revenue on, to wit, the 24th day of August, 1928.

7 XIII

Plaintiff further alleges that all of the income so reported by him and his wife for the year 1927 was their community income and property under the laws of the State of Washington and belonging jointly and equally to them, and that he is not subject to taxation, under the revenue act of 1926, upon his said wife's one-half of said community income, and that the action of the Commissioner of Internal Revenue in adding to the income so reported by him the share of said community income received and reported by his wife is illegal and erroneous, and likewise that the assessment and collection of said additional sums as taxes and interest for the year 1927 is improper, illegal, erroneous, and contrary to the provisions of the revenue act of 1926.

XIV

That the effect and result of the acts of the defendant in demanding and collecting from him a tax upon his income plus the income of his wife is to levy and collect a tax upon something not within the meaning of the term "income," as it is used in the sixteenth amendment to the Constitution of the United States.

XV

That the exaction and collection of said tax is in violation of the third clause of section 2, and the fourth clause of section 9, of Article I of the Constitution of the United States.

XVI

8 That the exaction and collection of said additional tax is in violation of section 8 of Article I and in violation of the fifth amendment to the Constitution of the United States.

XVII

The revenue act of 1926, if by its terms it provides for and requires that the income from the property of plaintiff and Mrs. Seaborn be taxed in the manner and amount exacted of plaintiff by

the Commissioner of Internal Revenue, is, as to this plaintiff, unconstitutional and void in that—

(a) It requires the collection from plaintiff of a tax based in whole or in part upon the income of Mrs. Seaborn;

(b) It requires the collection from plaintiff at progressive rates of a tax based not upon his income alone, but upon the combined incomes of plaintiff and Mrs. Seaborn, thereby not only obliging plaintiff to pay upon an income not his own, but obliging him to pay at a higher rate upon his own income;

(c) It forbids and prohibits plaintiff and Mrs. Seaborn from filing separate income-tax returns, including therein the income only belonging to and received by them, respectively, which right is allowed under the revenue act to citizens of other States;

(d) It levies a direct tax upon the real estate and invested personal property owned by plaintiff and Mrs. Seaborn and the fruits and revenues therefrom, which direct tax is not upon income as the term is used in the sixteenth amendment to the Constitution, and which is not apportioned among the several States upon the basis of any census or enumeration, and it is also arbitrary and capricious in that it uses as a basis and as the subject of a tax assessed
9 against and collected from plaintiff at progressive rates the combined incomes of himself and Mrs. Seaborn instead of the income only of plaintiff;

(e) It provides for the taking of the property of the plaintiff without due process of law and denies to him the equal protection of the law, and in all of which respects and particulars, as well as in other respects and particulars, it violates the third clause of section 2, the first clause of section 8, the fourth clause of section 9, all of Article I of the Constitution of the United States, as well as the fifth and sixteenth amendments to the Constitution of the United States.

XVII

That by reason of the premises plaintiff is entitled to have and recover from the defendant the taxes and interest so paid, together with interest thereon, as provided by law.

Wherefore, plaintiff prays for the issuance of citation to the defendant, and that upon final hearing hereof he have judgment against defendant for the taxes and interest so paid, amounting to $720.93, together with interest thereon from the date of payment at the rate of six per cent per annum, and all costs of suit; that there be issued by the court a certificate of probable cause for the conduct of defendant in his official capacity as aforesaid, and that plaintiff have such other and further relief as he may be entitled to.

DONWORTH, TODD & HOLMAN,
Attorneys for Plaintiff.

10 [*Duly sworn to by H. G. Seaborn; jurat omitted in printing.*]

[File endorsement omitted.]

In United States District Court

Answer filed Sept. 14, 1928

Comes now the above-named defendant, Burns Poe, as collector of internal revenue, by his attorney, Anthony Savage, United States attorney for the western district of Washington, and for answer to the plaintiff's complaint herein, admits, denies, and alleges as follows:

11

I

Admits the allegations contained in Paragraphs I, II, and III of said complaint.

II

Denies each and every allegation contained in Paragraph IV of said complaint, except that it is admitted that prior to the year 1927 the plaintiff and his wife had accumulated a considerable amount of property, which consisted of real estate situated in the State of Washington, stocks and bonds of various corporations, moneys, and other personal property, and that all of said property so accumulated was community property under the laws of the State of Washington.

III

Admits the allegations contained in Paragraphs V, VI, VII, and VIII of said complaint.

IV

Denies each and every allegation contained in Paragraph IX of said complaint, except that it is admitted that the plaintiff, at the time of filing his income tax return for the year 1927, paid to the defendant a tax in the sum of $152.38, and that the plaintiff's wife, at the time of filing her return for the year 1927, paid to the defendant, as tax thereon, the sum of $168.32.

V

Admits the allegations contained in Paragraphs X, XI, and XII of plaintiff's complaint.

12

VI

Denies each and every allegation contained in Paragraphs XIII, XIV, XV, XVI, XVII, and XVIII of said complaint.

Wherefore, defendant prays that said action be dismissed, with costs.

ANTHONY SAVAGE,
United States Attorney, Counsel for Defendant.

[*Duly sworn to by Anthony Savage; jurat omitted in printing.*]

[Endorsed]: Received a copy of the within answer this 13th day of September, 1928.

DONWORTH, TODD & HOLMAN,
Attorneys for Plaintiff.

[File endorsement omitted.]

13 In United States District Court

Opinion filed May 17, 1929

Plaintiff sues to recover from the collector an amount paid by him under protest on account of 1927 income taxes. Plaintiff and his wife having made separate returns and payments for that year he was thereafter required to pay a sum sufficient, with the payments theretofore made by him and his wife, to equal the amount due provided plaintiff should, instead of such separate returns, have reported the whole as his income.

The case was tried to the court upon an agreed statement of facts. The following summary of such statement from plaintiff's brief shows with sufficient fullness and detail the question presented:

"The plaintiff, H. G. Seaborn, and Charlotte A. Seaborn, were married at Seattle, Washington, December 11, 1902, and since
14 said date have continuously maintained the marriage relationship, continuously lived in the State of Washington and been citizens and residents of said State. Neither the plaintiff nor his said wife had any property at the date of their marriage and neither has since acquired any property by gift, bequest, devise, descent, or inheritance, but they have accumulated a considerable amount of property in the State of Washington, consisting of real estate situated in said State, stocks, bonds, moneys, and other personal property, all of which was and is the community property of the plaintiff and his said wife, under the laws of the State of Washington.

"The entire income, in and for the year 1927, of the plaintiff and his wife, reported by them on their income tax returns filed for said year, was their community income under the laws of the State of Washington and was derived as follows:

1. Salary of plaintiff for the year 1927 as an officer and employee of the Skinner & Eddy Corporation, a Washington corporation	$15,000.00
2. Interest on bank deposits, notes and corporation bonds	12,881.06
3. Dividends on stock of domestic corporations	8,834.57
4. Profit from sale of real estate, stocks, and bonds	606.59
5. Profit on sale of boat "Sea Gypsy"	500.00
6. Profit on Cities Service joint venture	625.95
Total	38,448.17

15 "The plaintiff, H. G. Seaborn, and his said wife Charlotte A. Seaborn, made separate returns, under the revenue act of 1926, for their incomes for the year 1927, each of said returns setting forth, as the income of the spouse making the same, one-half of the full community income of the spouse for said year. Both plaintiff and said wife, at the time required by law, paid an income tax for the 1927 income, computed on said returns separately considered. Thereafter, the Commissioner of Internal Revenue assessed a tax for said year gainst the plaintiff H. G. Seaborn, including a surtax, computing and assessing the same on the basis and theory that the entire community income was assessable and taxable to the husband alone. The defendant collector gave the plaintiff husband a credit on said

new assessment for the sums already paid by the plaintiff, and his said wife, and demanded payment of the unpaid balance amounting, with interest, to the sum of $720.93. Plaintiff thereupon, under due protest, paid said additional tax so assessed, and after proper proceedings instituted this suit to recover the excess sum so paid by him over and above the amount of tax computed, assessed and paid on the basis of separate returns, as hereinabove stated."

Plaintiff and defendant each moved for judgment upon the stated facts.

Plaintiff cites: Opinions of the Attorney General, Feb. 26, 1921 (32 Op. 435); Opinions of the Attorney General, Sept. 10,
16 1920 (32 Op. 298); Opinions of the Attorney General, July 16, 1927; United States vs. Robbins, 269 U. S. 315; Revenue Act of 1926 (44 St. L. 9, Part 2); Opinions of the Attorney General, Aug. 24, 1920 (32 Op. 298); Treasury Decisions, Sept. 18, 1920 (T. D. 3071); Treasury Decisions, Mar. 3, 1921 (T. D. 3138); Revenue Act of 1921 (H. R. 8245); Revenue Act of 1921, as reported by Finance Committee of Senate; United States vs. Falk, 204 U. S. 143 (51 L. Ed. 411); United States vs. Crecedo Hermanos, 209 U. S. 337 (52 L. Ed. 821); Smietanka vs. First Tr. & Sav. Bank, 257 U. S. 602 (66 L. Ed. 391); Provost vs. United States, 269 U. S. 443 (70 L. Ed. 352); Cf. Act, 1861, U. S. St. L. 12, p. 309, Sess. 2, Ch. 45, Sec. 49; Act 1862, U. S. St. L. 12, p. 473, Sess. 2, Ch. 119, Sec. 90; Act 1864, U. S. St. L. 13, p. 281, Sess. 1, Ch. 173, Sec. 116; Act 1894, U. S. St. L. 28, p. 553, Sess. 2, Ch. 349, Sec. 27; Act 1913, 38 St. L. 114, Sec. 11a (1); Act 1916, 39 St. L. 756, Title I, Part I, Sec. 1 (a); Act 1917, 40 St. L. 300, Title I, Sec. 1; Act 1918, 40 St. L. 1057, Title II, Part II, Secs. 210 and 211; Act 1921, 42 St. L. 233, Title II, Part II, Secs. 210 and 211; Act 1924, 43 St. L. 264, Title II, Part II, Secs. 210 and 211; Act 1926, 44 St. L. 21, Title II, Part II, Secs. 210 and 211; Rennsaeler & S. R. Co. vs. Irwin, 249 Fed. 726; certiorari denied, 246 U. S. 671 (62 L. Ed. 931); West End Street Ry. Co. vs. Malloy, 246 Fed. 625; certiorari denied, 246 U. S. 671 (62 L. Ed. 931); Northern Ry. Co. vs. Lowe, 250 Fed. 856; United States vs. Western Union Telegraph Company, 19 Fed. (2) 157; Towne vs. Eisner, 242 Fed. 702 at 704; Mutual Benefit Life Insurance Co. vs. Har-
17 rold, 188 Fed. 199; affirmed, 201 Fed 918; Amer. Net & Twine Co. vs. Worthington, 141 U. S. 468 (35 L. Ed. 821); Benziger vs. United States, 192 U. S. 38 (48 L. Ed. 331); Eidman vs. Martinez, 184 U. S. 578 (46 L. Ed. 697); Gould vs. Gould, 245 U. S. 151 (62 L. Ed. 211); Ehwab vs. Doyle, 258 U. S. 539 (66 L. Ed. 747); Reinecke vs. Gardner, U. S. Sup. Ct. Adv. Op. No. 13, p. 502 (48 Sup. Ct. 472); Crocker vs. Maley, 249 U. S. 223 (63 L. Ed. 573); Scott vs. Western Pac. Co., 246 Fed. 545; United States vs. Coulby, 251 Fed. 982, 258 Fed. 27; United States vs. Field, 255 U. S. 257 (65 L. Ed. 617); Smietanka vs. First Tr. & Sav. Bank, 268 Fed. 230; Bek vs. Miller, 8 Fed. (2) 797 at 799; Bacon vs. Hopkins, 27 Fed. (2) 140; Norman De Vaux vs. Commissioner of Internal Revenue, U. S. Board of Tax

Appeals, Docket No. 13574, decided by the Board on November 14th, 1928; Hill vs. Young, 7 Wash. 33 (34 Pac. 144); Holyoke vs. Jackson, 3 Wash. Ter. 235 (3 Pac. 841); Mabie vs. Whitaker, 10 Wash. 656 (39 Pac. 172); Warburton vs. White, 176 U. S. 484 (44 L. Ed. 555); Ambrose vs. Moore, 46 Wash. 463 at 466 (90 Pac. 588); Schneider vs. Biberger, 76 Wash. 504, at 507 (136 Pac. 701); James vs. James, 51 Wash. 60 (97 Pac. 1113); Sec. 1342, Remington's Compiled Statutes of Washington, 1922; Warburton vs. White, 18 Wash. 511 (52 Pac. 233, 52 Pac. 532); Ahern vs. Ahern, 31 Wash. 334 (71 Pac. 1023); Stewart vs. Bank of Endicott, 82 Wash. 106 (143 Pac. 458); Remington's Compiled Statutes of Washington, 1922, sections 6892 and 6893; Crawford vs. Morris, 92 Wash. 288 (158 Pac. 957); Schramm vs. Steele, 97 Wash. 309 (166 Pac. 634); Olive Co. vs. Meek,
18 103 Wash. 467 (175 Pac. 33); Snyder vs. Stringer, 116 Wash. 131 (198 Pac. 733); Coles vs. McNamara, 131 Wash. 691 (230 Pac. 430); Peterson vs. Zimmerman, 142 Wash. 385 (253 Pac. 642); Spokane State Bank vs. Tilton, 132 Wash. 641 (233 Pac. 15); Marston vs. Rue, 92 Wash. 129 (159 Pac. 111); Parker vs. Parker, 121 Wash. 24 (207 Pac. 1062); McDonough vs. Craig, 10 Wash. 239 (38 Pac. 1034); Allen vs. Chambers, 18 Wash. 341 (51 Pac. 478); Brotton vs. Langert, 1 Wash. 73 (23 Pac. 688); Day vs. Henry, 81 Wash. 61 (142 Pac. 439); Wilson vs. Stone, 90 Wash. 365 (156 Pac. 12); Fielding vs. Ketler, 86 Wash. 194 (149 Pac. 667); Spinning vs. Allen, 10 Wash. 570 (39 Pac. 151); Hoover vs. Chambers, 3 Wash. Terr. 26 (13 Pac. 547); Kaufman vs. Perkins, 114 Wash. 40 (194 Pac. 602); Little & Smythe Mfg. Co. vs. Miller, 3 Wash. 480 (28 Pac. 1035); Article I of the Constitution of the United States, sections 2, 8, and 9; fifth and sixteenth amendments to the Constitution of the United States; McKay on Community Property, sec. 1265; 30 Corpus Juris 564, sec. 97; I. T. Bulletin, Jan. to June, 1924 (C. B. VII-I, page 112); Arnett vs. Reade, 220 U. S. 311 (55 L. Ed. 477); Buchser vs. Buchser, 231 U. S. 157 (58 L. Ed. 166); Remington's Compiled Statutes of Washington, 1922, Section 6906; Hector vs. Hector, 51 Wash. 434 (99 Pac. 13); Kimble vs. Kimble, 17 Wash. 75 (49 Pac. 216); State ex rel. Lloyd vs. Superior Court, 55 Wash. 347 (104 Pac. 771); revenue act of 1926, section 1212; Calvin Phillips vs. Bergman, 130 Wash. 346 (227 Pac. 321); Calvin Phillips vs. Langlow, 55
19 Wash. 385 (104 Pac. 610); Horton vs. Donohoe-Kelly Bank, 15 Wash. 536 (46 Pac. 409); Shuey vs. Holmes, 22 Wash. 193 (60 Pac. 402); Donohoe-Kelly Banking Company vs. Puget Sound Bank, 13 Wash. 407 at 409; Rucker vs. Blair, No. 5662, Ninth Circuit Court of Appeals, decided April 1, 1929.

Defendant cites: Revenue act of 1926 (44 St. L. 9, Part 2); United States vs. Robbins, 269 U. S. 312; Civil Code of California, sec. 1401; Revised Laws of Nevada, sec. 2164; New Mexico Code of 1915, sec. 1840; Garrozi vs. Gastas, 204 U. S. 64; Daniel vs. Daniel, 181 Pac. 215; Merriman vs. Patrick, 174 Pac. 641; Richmond Screw and Anchor Company vs. United States, — U. S. —; United States vs. Title Insurance & Trust Company, 265 U. S. 472 at 486; McKay

on Community Property, section 1255; McAlpine vs. Kohler & Chase, 96 Wash. 146 (164 Pac. 755); Litzell vs. Hart, 96 Wash. 471 (165 Pac. 393); Potter vs. Couch, etc., 141 U. S. 296; Shorett vs. Signor, 107 Pac. 1033; Ostheller vs. R. Co., 182 Pac. 630; Katz vs. Judd, 185 Pac. 613; Holyoke vs. Jackson, 3 Wash. Ter. 235 (3 Pac. 841); Marston vs. Rue, 92 Wash. 129 (159 Pac. 634); Civil Code of California, sections 162, 163, 164, and 167; Remington's Compiled Statutes of Washington, 1922, sections 6890, 6891, 6892, and 6893; Gage vs. Gage, 138 Pac. 886; Barton vs. Southern Pacific Company, 63 Pac. 516; Remington's Compiled Statutes of Washington, 1922, sections 6895, 6896, and 6897; Civil Code of California, sections 168, 169, 172, and 173; Statutes of California, 1914, page 537; Remington's Compiled Statutes of Washington, section 7596; Remington's Compiled Statutes of Washington, 1922, sec. 10, 577; Schramm vs. Steele, 166 Pac. 634; Farmers, etc. Bank vs. Drew, 192 Pac. 105; Remington's Compiled Statutes of Washington, 1922, sections 1342 and 1419; Civil Code of California, sections 1401 and 1402; Remington's Compiled Statutes of Washington, 1922, section 989; Civil Code of California, section 146; Ritzville First National Bank vs. Cunningham, 130 Pac. 1148; Smietanka vs. First Trust & Savings Bank, 257 U. S. 602; revenue act of 1913 (38 St. L. 114); McKay on Community Property, sections 835 to 840, inclusive; Rucker vs. Blair, No. 5662, Ninth Circuit Court of Appeals, decided April 1, 1929; Allen vs. Commissioner of Internal Revenue, U. S. Board of Tax Appeals, No. 19438; revenue act of 1928.

CUSHMAN, District Judge:

The case was submitted to the court before the decision of the Circuit Court of Appeals for this circuit in the cases of Rucker vs. Blair. Since such decision each party hereto has filed a further brief.

Section 210 (a) of the act of February 26, 1926 (Part 2, 44 Statutes at Large, page 21) provides:

"Sec. 210. (a) In lieu of the tax imposed by section 210 of the revenue act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of *every individual* (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum; * * *" (Italics the court's.)

It is the defendant's contention that, under the laws of the State of Washington, so far as property and income are concerned, the marital community is an "individual" within the meaning of the above-quoted section in support of such contention, citing Holyoke vs. Jackson, 3 Wash. Ter. 235, and Marston vs. Rue, 92 Wash. 129.

The Circuit Court of Appeals for this circuit, in the cases of Rucker vs. Blair, 5662 and 5663, decided April 1, 1929, under the Revenue Act of 1918 (Part I, 40 Statutes at Large, page 1062) held that a separate return by the husband of his distributive share of community income for each of the years 1918 and 1919 was proper. In the opinion in the first of these cases the court said:

* * * * * * *

"The partnership return for 1918 exhibited a total distributive income of $95,699.27 divided equally between the two partners. Petitioner had no other income (except his compensation for personal services to the firm which is not in issue) and made his individual tax return for one-half only of his distributive share, upon the assumption that it was community income, and that therefore the other half was returnable by his wife.

Taking the view that the whole of his share was separate
22 property, the Commissioner made an assessment on that basis, and, by the order brought here for review, the Board of Tax Appeals affirmed the assessment.

"The question is whether such income was separate or community property.

"The pertinent State statutes are sections 6890, 6891, and 6892 of Remington's Compiled Statutes of Washington.

* * * * * * *

"6. The wife has during coverture as well as upon dissolution of the marriage a vested and definite interest and title in community property equal in all respects to the interest and title of her husband therein. Marston vs. Rue, 92 Wash. 129 (159 Pac. 111): Schramm vs. Steele, 97 Wash. 309 (166 Pac. 634); Huyvaertz vs. Roedtz, 105 Wash. 657 (178 Pac. 801). See also Opinion Attorney General March 3, 1921, T. D. 3138, 4 C. B. 238.

"And it is provided by section 1212 of the Revenue Act of 1926 (44 Stat. 9, 109) that 'income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period.'

* * * * * * *

"Our conclusion is that the petitioner's distributive share
23 was community income and was properly returned as such. The order appealed from is therefore reversed."

In the last brief filed for the defendant it is said of this case:

"In the case of Rucker vs. Blair it was the position of the Government itself that the income involved in that suit was properly returned provided the court should determine that the income in fact was community income. No other tenable position was possible. In section 1212 Congress expressly provided that community income for *periods prior to January 1, 1925*, might be returned by husband

and wife separately. The Circuit Court in the Rucker case *reached the conclusion that the income was, in fact, community income.* This settled the entire controversy. There was no other issue." (Last italic the court's.)

The court in Rucker vs. Blair not only reached the conclusion that the income in question was community income, but held that in Washington—

"* * * the wife has during coverture * * * a vested and definite interest and title in community property equal in all respects to the interest and title of her husband therein."

It inescapably follows that the wife has such interest and title in the community income for the income upon its receipt is not different in any respect which touches the present question from other community property. If her interest and title vests during coverture it vests upon receipt of the income, and she is, for the purposes of her share of such income, the 'individual' of such statute.

"The judgment will be for the plaintiff as prayed, to be settled upon notice."

[File indorsement omitted.]

In United States District Court

Defendant's requested conclusions of law filed July 15, 1929

Pursuant to trial of the above-entitled cause before the court without a jury comes now the defendant and respectfully moves that the court adopt the following conclusions of law:

I

Under the law of the State of Washington a wife has no such interest in the community income as to require the allowance of a division of such income between her and her husband in making returns for federal income tax purposes or in computing the tax thereon.

II

The revenue act of 1926 does not permit or require a division of community income between husband and wife domiciled in the State of Washington for income tax purposes, but that act requires the husband, who under the laws of said State alone has the disposition of the fund (although he is restricted in the matter of gifts, etc.), to return the community income as a whole and to pay the Federal income tax computed on the income as a whole.

III

That the plaintiff is not entitled to recover in said action.

IV

That said case should be dismissed, and that defendant have judgment for his costs and disbursements therein.

Dated at ———, Washington, this —— day of July, 1929.

————, *Judge.*

The defendant's motion for approval of the foregoing conclusions of law is hereby denied, to which ruling defendant excepts and the same is hereby allowed as of July 8th, 1929.

EDWARD E. CUSHMAN, *Judge.*

Dated at Seattle, Washington, this 15th day of July, 1929.

Received a copy of the within proposed conclusions of law this — day of July, 1929.

GEORGE DONWORTH,
Of Attorneys for Plaintiff.

26 [File indorsement omitted.]

In United States District Court for the Western District of Washington, Southern Division

No. 6965

H. G. SEABORN, plaintiff, *vs.* BURNS POE, collector of internal revenue, defendant

Final judgment filed July 8, 1929

This cause heretofore came on for trial before the court, without the intervention of a jury, a jury trial having been waived, and the issues of fact in this cause having been submitted to the court without the intervention of a jury, by written stipulation made by the parties and filed with the clerk of this court in accordance with sections 649 and 700 of the United States Revised Statutes.

The court has heretofore on this day duly made and filed in this cause special findings of fact and conclusions of law, in pursuance of which plaintiff is entitled to judgment against the defendant as hereinafter set forth.

Wherefore, by reason of the law and the premises, it is
27 now by the court considered, ordered, and adjudged that the plaintiff, H. G. Seaborn, do have and recover of and from the defendant, Burns Poe, collector of internal revenue, the sum of seven hundred twenty and 93/100 dollars ($720.93), together with interest thereon according to law from the date of payment, namely, August 23, 1928, and also the costs of this suit to be taxed by the clerk and the amount of such costs to be inserted in this judgment, in the further sum of ——— dollars ($——).

The court hereby certifies that there was probable and reasonable cause for the act of the defendant, the collector of internal revenue, in demanding and collecting from the plaintiff the internal-revenue tax, for the refund of which this judgment is entered.

Done in open court this 8th day of July, 1929.

EDWARD E. CUSHMAN, *Judge*

[File indorsement omitted.]

In United States District Court

Notice of appeal filed July 15, 1929

To H. G. Seaborn, plaintiff, and George Donworth and Frank E. Holman, his attorneys:

You and each of you will please take notice that Burns Poe, defend-
ant in the above-entitled cause, hereby appeals to the United
28 States Circuit Court of Appeals for the Ninth Circuit from
the judgment, decree, and order entered in the above-entitled cause on the eighth day of July, 1929, and that the certified transcript of record will be filed in the said appellate court within thirty days after the filing of this notice.

ANTHONY SAVAGE,
United States Attorney.
JOHN T. MCCUTCHEON,
Ass't United States Attorney.
GEORGE G. WITTER,
Special Atty., Internal Revenue.
T. H. LEWIS,
Special Attorney, Internal Revenue.

Received a copy of the within notice of appeal this 15th day of July, 1929.

GEORGE DONWORTH,
Of Attorneys for Plaintiff.

In United States District Court

Petition for order of appeal filed July 15, 1929

The above-named defendant, Burns Poe, conceiving himself aggrieved by the judgment and decree filed and entered on the —— day of July, 1929, in the above-entitled cause, does hereby appeal
from said judgment and the whole thereof to the United States
29 Circuit Court of Appeals for the Ninth Judicial Circuit for
the reasons and upon the grounds specified in the assignment of errors filed herewith, and prays that this, his appeal, be allowed; that a citation issue as provided by law, and that a transcript of the record and proceedings in said cause, duly authenticated, may be sent

to the United States Circuit Court of Appeals for the Ninth Judicial Circuit at San Francisco.

Dated at ———, Washington, this —— day of July, 1929.

ANTHONY SAVAGE,
United States Attorney.
JOHN T. MCCUTCHEON,
Ass't United States Attorney.

[File indorsement omitted.]

Receipt of a copy of the above and foregoing petition is hereby acknowledged this 15th day of July, 1929.

GEORGE DONWORTH,
One of Attorneys for Plaintiff.

30 In United States District Court

Order allowing appeal filed July 15, 1929

Upon petition of Burns Poe, Collector of Internal Revenue of the United States for the District of Washington, defendant in the above-entitled cause

It is ordered that the appeal of said defendant from the judgment herein to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed.

Dated at Seattle, Washington, this 15th day of July, 1929.

EDWARD E. CUSHMAN, *Judge.*

[File indorsement omitted.]

Receipt of a copy of the above order is hereby acknowledged this 15th day of July, 1929.

GEORGE DONWORTH,
One of Attorneys for Plaintiff.

In United States District Court

Assignments of error filed July 15, 1929

Burns Poe, Collector of Internal Revenue of the United States for the District of Washington, defendant in the above-entitled cause,
31 by Anthony Savage, United States attorney for the Western District of Washington, and John T. McCutcheon, assistant United States attorney, having filed notice of appeal as provided by law that the defendant appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in said cause against said defendant herein, now makes and files in support of said appeal the following assignments of error upon which he will rely for reversal of said judgment upon the said appeal, which said errors and each and every one of them are to the great detriment, injury, and prejudice of this defendant, and the said defendant says that in the records and proceedings upon the

hearing and determination thereof in the District Court of the United States for the Western District of Washington there are manifest errors in this, to wit:

I

That the court erred in making, finding, and entering its conclusions of law, and each and all of them, as follows:

Conclusion of law No. 1: The income referred to in the foregoing finding of fact, being community income of the plaintiff and of his wife, Charlotte A. Seaborn, was the income of both of said spouses, each spouse having, under the laws of the State of Washington, an equal vested title and interest of one-half of said income.

Conclusion of law No. 2: Said plaintiff and his said wife, Charlotte A. Seaborn, is and was each an individual within the meaning of section 210 (a) of the revenue act of February 26, 1926. (Part 2, 44 S. L. page 21.)

32 Conclusion of law No. 3: The income tax assessable and payable thereon, under the provisions of the revenue laws of the United States in force during the year 1927, imposed a tax upon plaintiff, H. G. Seaborn, as to only one half of said community income and imposed a tax upon plaintiff's said wife, Charlotte A. Seaborn, upon the other one half of said community income.

Conclusion of law No. 4: The assessment, imposition and collection of an additional income tax for said year 1927 upon and from said plaintiff, and which has been paid by plaintiff under protest as alleged in the complaint herein and as found by the court, was not authorized by law and was and is in excess of the requirements of law.

Conclusion of law No. 5: Plaintiff is entitled to recover the same from defendant.

The facts found by the court are not sufficient to support said conclusions, or any of them; to the conclusions of law found by the court, and to each and all of them, the defendant took timely exception herein.

II

That the court erred in making and entering judgment against the defendant and in favor of the plaintiff for the reasons that the facts found by the court are not sufficient to support said judgment; to which the defendant took timely exception herein.

III

That the court erred in denying defendant's motion for
33 judgment made at the trial of said cause for the reason that the evidence introduced in said cause was not sufficient to support a judgment for the plaintiff; to which the defendant took timely exception herein.

IV

That the court erred in declining to make and find the first conclusion of law requested by the defendant that under the law of the State of Washington the wife has no such interest in the community income as to require the allowance of the division of such income between her and her husband in making returns for Federal income-tax purposes or in computing the tax thereon, and the revenue act of 1926 does not permit or require such division, but requires the husband, who, under the laws of said State, alone has the disposition of the fund (although he is restricted in the matter of gifts, etc.) to return the community income as a whole, and to pay the Federal income tax computed on the income as a whole; to which refusal the defendant took timely exception herein.

V

That the court erred in refusing to make defendant's requested conclusions of law No. II; that the plaintiff is not entitled to recover in said action; to which refusal the defendant took timely exception herein.

VI

That the court erred in refusing to make defendant's requested conclusions of law No. III; that the said cause should be
34 dismissed, and the defendant have judgment for his costs and disbursements therein, to which refusal the defendant took timely exception herein.

ANTHONY SAVAGE,
United States Attorney.
JOHN T. MCCUTCHEON,
Assistant United States Attorney.
GEORGE G. WITTER,
Special Attorney Int. Revenue.

Received a copy of the within assignments of error this 15th day of July, 1929.

GEORGE DONWORTH,
Of Attorneys for Plaintiff.

[File indorsement omitted.]

In United States District Court

Bill of exceptions and order settling same

Be it remembered that the above-entitled cause came on to be heard before the Honorable Edward E. Cushman, judge of the above-entitled court, on the 14th day of December, 1928, plaintiff being represented by his attorneys, Mr. George Donworth and Mr. Frank E. Holman, and the defendant by his attorneys, Mr. John

T. McCutcheon, assistant United States attorney, and Mr. T. H. Lewis, jr., special counsel, Bureau of Internal Revenue; by a
35 stipulation in writing signed by the attorneys for both parties the intervention of a jury was waived.

Exception I

At the trial of the above-entitled cause there was introduced into evidence a stipulation and agreed statement of facts entered into between the plaintiff and the defendant, and no further evidence or testimony was offered in the trial of said cause. Said stipulation and agreed statement of facts is hereby expressly referred to and by this reference made a part of this bill of exceptions as fully as if incorporated word for word herein. At the conclusion of the hearing of said cause the defendant moved for judgment on the ground that the evidence introduced in said cause was insufficient to support a judgment for the plaintiff.

Thereafter, to wit, on May 17, 1929, the court handed down its memorandum decision finding the issues of said cause in favor of the plaintiff, and denying the defendant's said motion for judgment, to which the defendant duly excepted and said exception was allowed by the court.

Exception II

Thereafter, to wit, on the 8th day of July, 1929, the court made and entered its special findings of fact and conclusions of law in said cause. Reference is hereby expressly made to said findings of fact and conclusions of law, and by this reference the same are made a part of this bill of exceptions as fully as if incorporated word for word herein.

36 Exception III

Within the time allowed by the court the defendant took due exception to the conclusions of law made by the court and to each and all of said conclusions on the ground that the same were not supported by the findings of fact made by the court, which exception was by the court allowed.

Exception IV

After the conclusion of the hearing of said cause and within the time allowed by the court, the defendant submitted in writing to the court, after giving due notice to the plaintiff, the following conclusions of law and moved that the same be adopted by the court as its conclusions of law:

Conclusion of law No. 1 requested by defendant

Under the law of the State of Washington a wife has no such interest in the community income as to require the allowance of a division of such income between her and her husband in making returns for Federal income-tax purposes or in computing the tax thereon.

Conclusion of law No. 2 requested by defendant

The revenue act of 1926 does not permit or require a division of community income between husband and wife domiciled in the State of Washington for income-tax purposes, but that act requires the husband, who under the laws of said State alone has the disposition of the fund (although he is restricted in the matter of gifts, etc.), to return the community income as a whole and to pay the Federal income tax computed on the income as a whole.

37 Conclusion of law No. 3 requested by defendant

That the plaintiff is not entitled to recover in said action.

Conclusion of law No. 4 requested by defendant

That said case should be dismissed, and that defendant have judgment for his costs and disbursements therein.

The court denied said motion as to each and all of said conclusions of law so requested by defendant, whereupon the defendant duly excepted, and said exception was by the court allowed.

It is hereby certified that the foregoing proceedings were had upon the trial of this cause and that this bill of exceptions contains all the evidence, material matters, facts, and proceedings relative to or necessary to an understanding of the foregoing exceptions. The stipulation and agreed statement of facts and exhibits thereto attached, and the findings of fact and conclusions of law made by the court are by reference above and hereby made a part of this bill of exceptions.

It is further certified that the foregoing exceptions asked and taken by the defendant were allowed by the court, and this bill of exceptions was duly presented and filed within the time fixed by law and the orders of this court, and is by me fully allowed and signed this 15th day of July, 1929.

EDWARD E. CUSHMAN, *Judge.*

38 Receipt of a true copy of the above and foregoing bill of exceptions is hereby acknowledged this 15th day of July, 1929.

GEORGE DONWORTH,
One of Attorneys for Plaintiff.

In United States District Court

Findings of fact and conclusions of law by the court pursuant to trial without a jury, filed July 8, 1929

This cause heretofore came on for trial and was duly tried before the court and the undersigned judge thereof without a jury, a jury having been waived by due stipulation, in writing, signed by the attorneys for the respective parties and filed with the clerk of this

court pursuant to the provisions of sections 649 and 700 of the United States Revised Statutes.

At said trial there was submitted to the court a written agreed statement of facts. Pursuant to said trial and said agreed statement of facts the court does hereby find and determine the facts in said cause, as follows:

I

A. H. G. Seaborn, the plaintiff, at all times herein mentioned, has been, and is now, a citizen of the United States and of the State of Washington, residing in Seattle, King County, Washington, which is in the collection district for the collection of internal revenue of the United States known as the district of Washington.

39 B. Burns Poe, the defendant, is the duly appointed and qualified acting collector of internal revenue of the United States for the said district of Washington, and resides in Tacoma, Pierce County, Washington, which is in the said collection district of the United States known as the district of Washington.

C. King County and Pierce County, Washington, are both in the district for the collection of internal revenue of the United States known as the district of Washington, and also in the judicial district of the United States known as the western district of Washington, but King County is in the northern division and Pierce County in the southern division of said district.

D. The taxes and interest sued for in this proceeding were paid by the plaintiff to the defendant in his official capacity, and defendant's action in demanding and collecting the same was in accordance with instructions of his superior officers duly appointed, qualified and acting. The defendant, in so demanding and collecting such taxes and interest, had probable cause therefor, and, in the event of a decision in this case adverse to him, he is entitled to a certificate of probable cause.

E. The plaintiff and his wife, Charlotte A. Seaborn, were married on December 11, 1902, and since said time have continuously maintained the marriage relation, have ever since resided in the State of Washington, and the said Charlotte A. Seaborn has been throughout such period and is now a citizen of said State.

40 F. Neither the plaintiff nor his said wife, at the time of their marriage, had any property, or pecuniary rights and neither of them has since acquired any property or pecuniary rights by gift, bequest, devise, descent, or inheritance.

G. Plaintiff and his said wife, during and prior to the year 1927, accumulated a considerable amount of property in the State of Washington, consisting of real estate situated in said State, and of stocks, bonds, moneys, and other personal property, all of which was and is the community property of the pla'ntiff and his said wife under the laws of the State of Washington. The said stocks, bonds, moneys, and other personal property stood, during the period of

ownership, in the name of the pla'ntiff. The record title (as referred to in secs. 10577 and 10578 Rem. Comp. Stat. of Washington, 1922) to said real estate stood, during the period of ownership, in the name of the plaintiff, with no notice of claim of community interest filed of record, as permitted by sec. 10578 of Rem. Comp. Stat. of Washington, 1922. The income set forth in subdivisions 2, 3, 4, 5, and 6 of paragraph H next following was derived during the year 1927 from the said property hereinabove mentioned in this paragraph G.

H. The entire income in and for the year 1927 of plaintiff and/or wife and/or of the community, which was all of the income which was, under the revenue laws of the United States, required to be included in and returned as gross income, was as follows:

1. Salary of plaintiff for the year 1927 as an office and employee of the Skinner & Eddy Corporation, a Washington corporation	$15,000.00
2. Interest on bank deposits, notes, and corporation bonds	12,881.06
3. Dividends on stock of domestic corporations	8,834.57
4. Profit from sale of real estate, stocks, and bonds	606.59
5. Profit on sale of boat "Sea Gypsy"	500.00
6. Profit on Cities Service joint venture	625.95
Total	38,448.17

None of the aforesaid income was rents, issues, or profits from property or pecuniary rights owned by the husband before marriage or acquired by him afterwards by gift, bequest, devise, or descent or from property or pecuniary rights of the wife at the time of her marriage or afterwards acquired by gift, devise, or inheritance.

I. The plaintiff paid from the community funds for the year 1927 the following sums, which constitute allowable and proper deductions from gross income in the calculations of net income under the revenue act of 1926:

Interest paid	$9,097.51
Taxes paid	782.26
Charitable contributions	1,716.68
Earnest money forfeited	250.00
Bad debt allowance	325.00
Total allowable deductions	12,171.45

42 J. The plaintiff and his wife each filed with the defendant herein, within the time required by law, income-tax returns for the year 1927, and made a faithful and bona fide attempt to report their said income and pay the income-tax liability therein as required by the revenue act of 1926. The defendant was the proper collector with whom the same should be filed. The returns were on Form 1040, furnished to taxpayers by the Bureau of Internal Revenue. Copies of the returns filed by the plaintiff and his wife are hereto attached and made a part hereof, marked, respectively, Exhibits A and B. In each return there was included, under proper headings, one-half of the income above described, from which there was subtracted one-half of the deductions above itemized, leaving on each return a balance of $13,138.36 as their respective net incomes

before deducting personal exemption and earned income credit. The tax liability of the plaintiff upon the income so reported by him, at the rates provided by the revenue act of 1926, after giving effect to plaintiff's claim of personal exemption in the sum of $1,750.00 and plaintiff's claim to earned income in the sum of $7,500.00, was $152.38, which plaintiff paid in full at the time required by law; and the tax liability of plaintiff's said wife upon the income so reported by her, at the rates provided by the revenue act of 1926, after giving effect to said wife's claim of personal exemption in the sum of $1,750.00, and her claim to earned income in the sum of $5,000.00,
43 was the sum of $168.32, which said wife paid to the defendant at the time required by law. All of said income so reported by the plaintiff and his said wife in the year 1927 was their community income under the laws of the State of Washington. If plaintiff and his wife were entitled to divide income, less deductions, exemptions, and credits as above described, the plaintiff's return was correct and the tax liability of the plaintiff thereon was as stated on his return.

K. Upon auditing the aforesaid tax return of the plaintiff, the Commissioner of Internal Revenue determined that said return of the plaintiff was incorrect in that, according to the determination of the commissioner, the plaintiff should have reported all of said income and claimed all of said deductions, and the tax should have been computed and paid at the rates provided in the revenue act of 1926, upon a net income of $26,276.72, less the personal exemption and earned income credit provided by law, instead of upon two net incomes of one-half of said sum. Under such a theory the tax liability of the plaintiff for 1927 would be $703.01 in addition to the amount shown on said return, or a total of $855.39. Thereupon the Commissioner of Internal Revenue notified plaintiff of this determination in accordance with the provisions of section 274 of the revenue act of 1926, and afforded the plaintiff an opportunity to appeal from this determination to the United States Board of Tax Appeals. The plaintiff waived this right, without prejudice to the right to test the matter in the courts, and the commissioner thereupon assessed against the plaintiff, on the 23rd day of August, 1928, said
44 additional sum of $703.01 as a deficiency in income tax due by him for the year 1927, and interest in the sum of $17.92, or a total of $720.93. Said assessment was certified to the defendant, who, on the 23rd day of August, 1928, made formal notice and demand upon the plaintiff for the payment of the same.

L. The plaintiff thereafter, on the 23rd day of August, 1928, paid to the defendant the sum so demanded of him, and at the time of said payment protested, in writing, against the collection of said sum, notifying the defendant that the same was paid only to avoid the imposition of penalties, additional interest, and seizure and sale of property which would ensue if the demand had not been complied with.

M. On the 23rd day of August, 1928, the plaintiff filed with the defendant a claim for the refunding of said sum, a copy of which is hereto attached, made part hereof, and marked Exhibit C, which claim was rejected by the Commissioner of Internal Revenue on the 24th day of August, 1928, whereupon this suit was instituted.

N. The plaintiff has complied with all of the conditions precedent and other formal requirements of the statutes and rules relating to his right to institute and prosecute this suit in the manner and upon the grounds alleged in his pleadings, and all informalities have been waived. The defendant and other officers of the United States have complied with all formal requirements of the statutes and regulations in making the deficiency assessments, in collecting the same, and in rejecting plaintiff's claim for the refund.

II

Without limitation upon the power of this court or any
45 appellate court to take judicial notice, the court further finds that the records of the Congress of the United States disclose the following proceedings:

A-1. The revenue act of 1921, as introduced into the House of Representatives, as reported by the Ways and Means Committee of the House and as passed by the House, contained the following clause:

"Income received by any community shall be included in the gross income of the spouse having management and control of the community property."

2. The revenue act of 1921, as reported by the Finance Committee of the Senate, substituted for the above-quoted clause the following:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

3. The Finance Committee, in making its report to the Senate, discussed the foregoing provisions as follows, at page 14 of the report:

"Under an opinion of the Attorney General residents of States having a community property law enjoy marked advantage over residents of other States. Income which in other States is taxed as a unit to the husband, is divided between husband and wife in States having community property laws, and surtaxes are correspondingly reduced. An amendment is added to this section designed
46 to restore uniformity of treatment by providing that income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

4. The bill, as passed by the Senate, eliminated the clause above quoted and as finally enacted contained no specific reference to community income.

B–1. Committee print No. 1 of the revenue act of 1924, as introduced into the Sixty-eighth Congress and filed on December 17, 1923, was entitled as follows: "The Revenue Act of 1924, Containing Proposed Amendments to the Existing Law Suggested by the Secretary of the Treasury," and at page 58 of the bill there was included, described as new matter, the following provision:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

2. The bill, as reported by the Ways and Means Committee of the House of Representatives, eliminated the foregoing clause and contained no reference to community income.

C–1. While the Senate was considering the revenue act of 1926, the following amendment of page 12 of the bill was offered by Senator Wesley M. Jones, of the State of Washington:

47 "The liability of any taxpayer under any internal revenue law shall be determined, unless such taxpayer otherwise consents or requests, in accordance with the Treasury Decisions, Opinions of the Attorney General, and regulations made by the commissioner or the Secretary, or by the commissioner with the approval of the Secretary, in force at the time his return was made, whether such return was made before or after the enactment of this act. As used in this subdivision, the term 'return' means, in the case of a return which has been amended, the return as finally amended."

2. On February 12, 1926, the Senate, without a record vote, adopted the foregoing amendment, the same appearing in the bill as adopted by the Senate as section 1213. In conference there was substituted for this provision a clause in the language of and which became section 1212 of the revenue act of 1926.

CONCLUSIONS OF LAW

And from the foregoing facts the court concludes as a matter of law (1) that the income referred to in the foregoing findings of fact, being community income of the plaintiff and of his wife, Charlotte A. Seaborn, was the income of both of said spouses, each spouse having, under the laws of the State of Washington, an equal vested title and interest of one-half of said income, and (2) that said plaintiff and his said wife, Charlotte A. Seaborn, is and was each an

individual within the meaning of section 210 (a) of the revenue act of February 26, 1926 (Part 2, 44 S. L., page 21), and 48

(3) that the income tax assessable and payable thereon, under the provisions of the revenue laws of the United States in force during the year 1927 imposed a tax upon plaintiff, H. G. Seaborn, as to only one-half of said community income and imposed a tax upon plaintiff's said wife, Charlotte A. Seaborn, upon the other one-half of said community income, and (4) that the assessment, imposition, and collection of an additional income tax for said year 1927 upon

and from said plaintiff, and which has been paid by plaintiff under protest as alleged in the complaint herein and as found by the court, was not authorized by law and was and is in excess of the requirements of law, and (5) plaintiff is entitled to recover the same from defendant.

Let judgment be entered accordingly.

Done in open court this 8th day of July, 1929.

EDWARD E. CUSHMAN, *Judge.*

49 EXHIBIT A TO COURT FINDINGS

[Copy]

Individual income-tax return for net incomes from salaries or wages of more than $5,000, or incomes, regardless of amount, from business, profession, rents, or sale of property for calendar year 1927

File this return with the collector of internal revenue for your district on or before March 15, 1928

(Print name and address plainly below)

H. G. Seaborn, 7th floor, Skinner Bldg., Seattle, Washington.

Occupation, profession, or business: Executive.

1. Are you a citizen or resident of the United States? Yes.

2. If you filed a return for 1926, to what collector's office was it sent? Tacoma, Wash.

3. Is this a joint return of husband and wife? No.

4. State name of husband or wife if a separate return was made and the collector's office where it was sent. Charlotte A. Seaborn, Tacoma, Wash.

5. Were you married and living with husband or wife on the last day of your taxable year? Yes.

6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you? ———.

7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change. No.

8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? None.

Item and Instruction No.	Amount received	Expenses paid (Explain in Schedule F)		
INCOME				
1. Salaries, wages, commissions, etc. (State name and address of person from whom received): Skinner & Eddy Corporation, 7th Floor Skinner Bldg., Seattle, Washington	$15,000.00	½	$7,500.00	
2. Income from business or profession. (From Schedule A)	12,881.06	½	6,440.53	
3. Interest on bank deposits, notes, corporation bonds, etc. (except interest upon which a tax was paid at source)				
(a) Interest on tax-free covenant bonds upon which a tax was paid at source				
4. Income from partnerships. (State name and address)				
(a) Income from fiduciaries. (State name and address)				
5. Rents and royalties. (From Schedule B)				
6. Profit from sale of real estate, stocks, bonds, etc. (From Schedule C)	606.59	½	303.30	
7. Dividends on stock of domestic corporations	8,834.57	½	4,417.28	
8. Taxable interest on Libery bonds, etc. (From Schedule E)				
9. Other income (including dividends received on stock of foreign corporations). (State nature of income): (a) Cities Service Joint venture $625.95; (b) Sale of boat Sea Gypsy 500.00	1,125.95	½	562.98	
10. Total income in items 1 to 9				$19,224.09
DEDUCTIONS				
11. Interest paid	9,097.51	½	$4,548.76	
12. Taxes paid. (Explain in Schedule F)	782.26	½	391.13	
13. Losses by fire, storm, etc. (Explain in Table on page 2)				
14. Bad debts. (Explain in Schedule F)	325.00	½	162.50	
15. Contributions. (Explain in Schedule F)	1,716.68	½	858.34	
16. Other deductions authorized by law: Earnest money forfeited. (Explain in Schedule F)	250.00	½	125.00	
17. Total deductions in items 11 to 16				6,085.73
18. Net income (item 10 minus item 17)				13,138.36

COMPUTATION OF TAX (See Instruction 21)

19. Earned net income (not over $20,000)		$7,500.00
20. Less personal exemption and credit for dependents (see instruction 20)		1,750.00
21. Balance (item 19 minus 20)		5,750.00
22. Amount taxable at 1½% (not over the first $4,000 of Item 21)		4,000.00
23. Amount taxable at 3% (not over the second $4,000 of Item 21)		1,750.00
24. Amount taxable at 5% (balance over $8,000 of Item 21		
25. Normal tax (1½% of item 22)		60.00
26. Normal tax (3% of item 23)		52.50
27. Normal tax (5% of item 24)		
28. Surtax on item 19 (see instruction 21)		
29. Tax on earned net income (total of items 25, 26, 27, and 28)		112.50
30. Credit of 25% of item 29 (not over 25% of items 28, 42, 43, and 44)		28.13
31. Net income (item 18 above)		13,138.36
32. Less dividends (item 7 above)	$4,417.28	
33. Interest on Liberty Bonds, etc., (item 8)		
34. Personal exemption	1,750.00	
35. Credit for dependents		
36. Total of items 32, 33, 34, and 35		6,167.28
37. Balance (item 31 minus 36)		6,971.08
38. Amount taxable at 1½% (not over the first $4,000 of item 37)		4,000.00
39. Balance (item 37 minus 38)		2,971.08
40. Amount taxable at 3% (not over the second $4,000 of item 37)		2,971.08
41. Amount taxable at 5% (balance over $8,000 of item 37)		
42. Normal tax (1½% of item 38)		60.00
43. Normal tax (3% of item 40)		89.13
44. Normal tax (5% of item 41)		
45. Surtax on item 18 (see instruction 21)		31.38
46. Tax on net income (total of items 42, 43, 44, and 45)		180.51
47. Less credit of 25% of tax on earned net income (item 30)		28.13
48. Balance (item 46 minus 47)		152.38
49. Adjustment for capital gain or loss (12½% of column 9, schedule D)		
50. Total tax (total of or difference between items 48 and 49)		
51. Less income tax paid at source		
52. Income and profits taxes paid to a foreign country or U. S. possession		
53. Balance of tax (item 50 minus items 51 and 52)		152.38

50 SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15, AND 16

Bad debts—item 14:	
W. H. Logan	$125.00
Pettibone	200.00
	325.00
Contributions—item 15:	
Seattle Community Fund	750.00
St. Marks Cathedral	416.68
Orthopedic Hospital	275.00
American Red Cross	100.00
Hazel Mission	25.00
Missionary Sisters, Sacred Heart	150.00
	1,716.68

51 H. G. SEABORN

Schedule C.—Profit from sale real estate, stocks, bonds, etc.
Year 1927

	Date acquired	Amount received	Cost	Profit
Real estate:				
Lake Washington Shorelands	1927	$12,762.33	$5,761.41	$7,000.92
Bonds:				
Agricultural Mtg. Bank of Columbia	1927	4,849.00	4,875.00	[1] 26.00
American Toll Bridge	1925	5,050.00	4,875.00	175.00
Associated Gas & Electric	1927	4,875.00	4,787.50	87.50
Caldas, Dept. of	1926	9,686.50	9,775.00	[1] 88.50
Coos Bay Water Co	1926	4,950.00	4,887.50	62.50
Empire Gas & Fuel	1926	5,275.00	4,862.50	412.50
Inland Power & Light	1927	10,050.00	9,575.00	475.00
Int. Railways of Central Amer	1927	4,500.00	4,587.50	[1] 87.50
Montecatini	1927	4,843.75	4,825.00	18.75
Oklahoma Natural Gas Corp	1926	5,162.50	4,937.50	225.00
Serbs, Croats & Slovenes	1927	4,412.50	4,625.00	[1] 212.50
Stocks:				
Caterpillar Tractor	1925	11,414.57	9,310.75	2,103.82
Central Gas & Electric	1926	4,812.50	4,787.50	25.00
Central Public Service	1927	991.75	500.00	491.75
Continental Gas & Electric	1925	5,100.00	3,875.00	1,225.00
East Bay Water Company	1926	9,875.00	9,587.50	287.50
Goodyear Tire & Rubber Co. of California	1927	4,030.00	3,890.00	140.00
Hawaiian & Commercial Sugar	1925	4,900.00	4,787.50	112.50
Indianapolis Power & Light	1927	9,850.00	9,800.00	50.00
Jersey Central Power & Light	1925	10,396.10	10,172.50	223.60
I. Magnin & Company	1927	1,423.50	1,250.00	173.50
Manhattan Railway	1925	8,200.00	8,685.00	[1] 485.00
Pacific Lighting Corporation	1927	10,614.00	9,587.50	1,026.50
Richfield Oil Common	1926	5,551.50	5,000.00	551.50
Sherman Clay & Company	1926–27	9,537.50	9,306.25	231.25
Safety Cable	1926	6,878.50	4,900.00	1,978.50
Zellerbach Corporation	1926	4,802.50	4,875.00	[1] 72.50
El Estado Products Company	1926	1.00	15,500.00	[1] 15,499.00
	.....	184,795.00	184,188.41	606.59

[1] Denotes loss.

52 EXHIBIT C TO COURT FINDINGS

CLAIM FOR REFUND OF TAXES ILLEGALLY COLLECTED

STATE OF WASHINGTON,
County of King, ss:

Exhibit C

Name of taxpayer or purchaser of stamps: H. G. Seaborn.
Residence (give street and number as well as city or town and State): 2240 Everett N., Seattle, Washington.
Business address: 7th Floor, Skinner Building, Seattle, Washington.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Employee of Skinner & Eddy Corporation and managing own affairs.
2. Character of assessment or tax: Income tax for year 1927.

Period: From Dec. 31st, 1926, to Dec. 31st, 1927

3. Amount: $855.39.
4. Reduction of tax liability requested (income and profits tax): $703.01.
5. Amount to be abated: $703.01 plus $17.92 interest: total, $720.93.
6. Amount to be refunded (or such greater amount as is legally refundable): $720.93.
7. Dates of payment (see collector's receipts or indorsements of canceled checks): Mar. 14, 1928, Pd. $152.38; Aug. 23, Pd. $720.93. (If statement covers income-tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed: Tacoma, District of Washington.
9. District in which unpaid assessment appears: Tacoma, District of Washington.
10. Amount of overpayment claimed as credit: $720.93.
11. Unpaid assessment against which credit is asked; period from ——— to ———: $———.

Deponent verily believes that this application should be allowed for the following reasons:

Deponent and his wife, Charlotte A. Seaborn, both residents and citizens of the State of Washington, having a net community income for 1927 of $26,276.72, each filed separate returns for one-half of that amount, or $13,138.36; deponent's tax on his net income so returned, calculated under the rates provided by the revenue act of 1926, was $152.38, after allowing credit for his personal exemptions and earned

income as shown on his said return; this tax of $152.38 deponent paid to the collector March 14, 1928; thereafter the Commissioner of Internal Revenue determined that all of said community income should have been returned by deponent and deponent's tax calculated upon a net income of $26,276.72; whereupon, under instructions from said commissioner, said collector demanded of deponent an additional tax of $703.01, which deponent paid, under protest, August 23, 1928.

Deponent avers that he is not subject to taxation upon his wife's one-half of said community income; that the acts of the commissioner and the collector in adding to the income so reported by him the share of said community income received and reported by his wife and requiring him to pay an additional tax on that account were illegal, erroneous, contrary to the provisions of the revenue act of 1926, and contrary to the Constitution of the United States, and that said sum of $703.01 so exacted from him should be refunded, with interest.

Sworn to and subscribed before me this 23rd day of August, 1928.

(Signed) H. G. SEABORN.

[SEAL.] EUGENE C. LUCCOCK,
Notary Public.

52–53 EXHIBIT B TO COURT FINDINGS

Individual income-tax return for net incomes from salaries or wages of more than $5,000, or incomes, regardless of amount, from business, profession, rents, or sale of property, for calendar year 1927.

File this return with the collector of Internal Revenue for your district on or before March 15, 1928

(Print name and address plainly below)

Charlotte A. Seaborn, 7th floor, Skinner Bldg., Seattle, Wash.

1. Are you a citizen or resident of the United States? Yes.

2. If you filed a return for 1926, to what collector's office was it sent? Tacoma, Wash.

3. Is this a joint return of husband and wife? No.

4. State name of husband or wife if a separate return was made and the collector's office where it was sent. H. G. Seaborn, Tacoma, Wash.

5. Were you married and living with husband or wife on the last day of your taxable year? Yes.

6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you? * * *

7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change. No.

8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? None.

Item and instruction No.	Amount received by H. G. Seaborn	Expenses paid (explain in Schedule F)		
INCOME				
1. Salaries, wages, commissions, etc. (State name and address of person from whom received)	$15,000.00	½	$7,500.00	
2. Income from business or profession. (From Schedule A)	12,881.06	½	6,440.53	
3. Interest on bank deposits, notes, corporation bonds, etc. (except interest upon which a tax was paid at source)				
(a) Interest on tax-free covenant bonds upon which a tax was paid at source				
4. Income from partnerships. (State name and address)				
(a) Income from fiduciaries. (State name and address)				
5. Rents and royalties. (From Schedule B)				
6. Profit from sale of real estate, stocks, bonds, etc. (From Schedule C)	606.59	½	303.29	
7. Dividends on stock of domestic corporations	8,834.57	½	4,417.29	
8. Taxable interest on Liberty bonds, etc. (From Schedule E)				
9. Other income (including dividends received on stock of foreign corporations). (State nature of income)	1,125.95	½	562.97	
(a)				
(b)				
10. Total income in items 1 to 9				$19,224.08
DEDUCTIONS				
11. Interest paid	9,097.51	½	4,548.75	
12. Taxes paid. (Explain in Schedule F)	782.26	½	391.13	
13. Losses by fire, storm, etc. (Explain in table on page 2)				
14. Bad debts. (Explain in Schedule F)	325.00	½	162.50	
15. Contributions. (Explain in Schedule F)	1,716.68	½	858.34	
16. Other deductions authorized by law. (Explain in Schedule F)	250.00	½	725.00	
17. Total deductions in items 11 to 16				6,085.72
18. Net income (item 10 minus item 17)				13,138.36

COMPUTATION OF TAX. (See Instruction 21)

19. Earned net income (not over $20,000)			$5,000.00
20. Less personal exemption and credit for dependents (see Instruction 20)			1,750.00
21. Balance (item 19 minus 20)			3,250.00
22. Amount taxable at 1½% (not over the first $4,000 of item 21)			3,250.00
23. Amount taxable at 3% (not over the second $4,000 of item 21)			
24. Amount taxable at 5% (balance over $8,000 of item 21)			
25. Normal tax (1½% of item 22)			48.75
26. Normal tax (3% of item 23)			
27. Normal tax (5% of item 24)			
28. Surtax on item 19 (see Instruction 21)			
29. Tax on earned net income (total of items 25, 26, 27, and 28)			48.75
30. Credit of 25% of item 29 (not over 25% of items 28, 42, 43, and 44)			12.19
31. Net income (item 18 above)			13,138.36
32. Less dividends (item 7 above)		$4,417.29	
33. Interest on Liberty bonds, etc. (item 8)			
34. Personal exemption		1,750.00	
35. Credit for dependents			
36. Total of items 32, 33, 34, and 35			6,167.29
37. Balance (item 31 minus 36)			6,971.07
38. Amount taxable at 1½% (not over the first $4,000 of item 37)			4,000.00
39. Balance (item 37 minus 38)			2,971.07
40. Amount taxable at 3% (not over the second $4,000 of item 37)			2,971.07
41. Amount taxable at 5% (balance over $8,000 of item 37)			
42. Normal tax (1½% of item 38)			60.00
43. Normal tax (3% of item 40)			89.13
44. Normal tax (5% of item 41)			
45. Surtax on item 18 (see Instruction 21)			31.38
46. Tax on net income (total of items 42, 43, 44, and 45)			180.51
47. Less credit of 25% of tax on earned net income (item 30)			12.19
48. Balance (item 46 minus 47)			168.32
49. Adjustment for capital gain or loss (12½% of column 9, Schedule D)			
50. Total tax (total of or difference between items 48 and 49)			
51. Less income tax paid at source			
52. Income and profits taxes paid to a foreign country or U. S. possession			
53. Balance of tax (item 50 minus items 51 and 52)			168.32

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue act of 1926, and the Regulations issued under authority thereof.

CHARLOTTE A. SEABORN.

Sworn to and subscribed before me this 13th day of March, 1928.

[NOTARIAL SEAL.] M. D. ARNQUIST.

54 SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15, AND 16

Bad debts—Item #14:	
W. H. Logan	125
Pettibone	200
	325
Contributions—Item #15:	
Seattle Community Fund	750.00
St. Marks Cathedral	416.68
Orthopedic Hospital	275.00
American Red Cross	100.00
Hazel Mission	25.00
Missionary Sisters Sacred Heart	150.00
	1,716.68

55 H. G. SEABORN

Schedule C.—Profit from sale real estate, stocks, bonds, etc., year 1927

	Date acquired	Amount received	Cost	Profit
Real estate:				
Lake Washington Shorelands	1927	$12,762.33	$5,761.41	$7,000.92
Bonds:				
Agricultural Mtg. Bank of Columbia	1927	4,849.00	4,875.00	[1] 26.00
American Toll Bridge	1925	5,050.00	4,875.00	175.00
Associated Gas & Electric	1927	4,875.00	4,787.50	87.50
Caldas, Dept. of	1926	9,686.50	9,775.00	[1] 88.50
Coos Bay Water Co.	1926	4,950.00	4,887.50	62.50
Empire Gas & Fuel	1926	5,275.00	4,862.50	412.50
Inland Power & Light	1927	10,050.00	9,575.00	475.00
International Railways of Central America	1927	4,500.00	4,587.50	[1] 87.50
Montecatini	1927	4,843.75	4,825.00	18.75
Oklahoma Natural Gas Corp	1926	5,162.50	4,937.50	225.00
Serbs, Croats & Slovenes	1927	4,412.50	4,625.00	[1] 212.50
Stocks:				
Caterpillar Tractor	1925	11,414.57	9,310.75	2,103.82
Central Gas & Electric	1926	4,812.50	4,787.50	25.00
Central Public Service	1927	991.75	500.00	491.75
Continental Gas & Electric	1925	5,100.00	3,875.00	1,225.00
East Bay Water Co.	1926	9,875.00	9,587.50	287.50
Goodyear Tire & Rubber Co. of California	1927	4,030.00	3,890.00	140.00
Hawaiian & Commercial Sugar	1925	4,900.00	4,787.50	112.50
Indianapolis Power & Light	1927	9,850.00	9,800.00	50.00
Jersey Central Power & Light	1925	10,396.10	10,172.50	223.60
I. Magnin & Company	1927	1,423.50	1,250.00	173.50
Manhattan Railway	1925	8,200.00	8,685.00	[1] 485.00
Pacific Lighting Corporation	1927	10,614.00	9,587.50	1,026.50
Richfield Oil Common	1926	5,551.50	5,000.00	551.50
Sherman Clay & Company	1926/27	9,537.50	9,306.25	231.25
Safety Cable	1926	6,876.50	4,900.00	1,978.50
Zellerbach Corporation	1926	4,802.50	4,875.00	[1] 72.50
El Estado Products Company	1926	1.00	15,500.00	[1] 15,499.00
		184,795.00	184,188.41	606.59

[1] Denotes loss.

57 MARCH 14, 1928.

COLLECTOR OF INTERNAL REVENUE,
Seattle, Washington.

DEAR SIR: I am enclosing herewith 127 return of income, Form 1040, for Charlotte A. Seaborn, together with check for $168.32, same being payment in full.

Will you please acknowledge receipt on the enclosed carbon of this letter.

Very truly yours,

E. G. McCOY,
Auditor.

EGMc/A

(Received: Collector of internal revenue, district of Washington, March 14, 1928, Seattle office.)

[File indorsement omitted.]

In United States District Court

Stipulation and agreed statement of facts

Filed Nov. 12, 1928

The parties hereto, by their undersigned attorneys of record duly authorized, hereby stipulate and agree, as follows:

I

58 That a jury trial is waived, and the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes. (Secs. 773 and 875, U. S. C.)

II

It is agreed that the following is a true statement of the pertinent facts in this case, and the same shall be submitted thereon as an agreed statement of facts; that is to say:

A. H. G. Seaborn, the plaintiff, at all times herein mentioned has been, and is now, a citizen of the United States and of the State of Washington, and now resides in Seattle, King County, Washington, which is in the collection district for the collection of internal revenue of the United States known as the district of Washington.

B. Burns Poe, the defendant, is the duly appointed and qualified acting collector of internal revenue of the United States for said district of Washington, and resides in Tacoma, Pierce County, Washington, which is in the said collection district of the United States known as the district of Washington.

C. King County and Pierce County, Washington, are both in the district for the collection of internal revenue of the United

States known as the district of Washington, and also in the judicial district of the United States known as the western district of Washington, but King County is in the northern division and Pierce County in the southern division of said district.

D. The taxes and interest sued for in this proceeding were
59 paid by the plaintiff to the defendant in his official capacity, and defendant's action in demanding and collecting the same was in accordance with instructions of his superior officers duly appointed, qualified and acting. The defendant, in so demanding and collecting such taxes and interest, had probable cause therefor, and, in the event of a decision in this case adverse to him, he is entitled to a certificate of probable cause.

E. The plaintiff and his wife, Charlotte A. Seaborn, were married on December 11, 1902, and since said time have continuously maintained the marriage relation; have ever since resided in the State of Washington and the said Charlotte A. Seaborn has been throughout such period and is now a citizen of said State.

F. Neither the plaintiff nor his said wife, at the time of their marriage, had any property, or pecuniary rights and neither of them has since acquired any property or pecuniary rights by gift, bequest, devise, descent, or inheritance.

G. Plaintiff and his said wife, during and prior to the year 1927, accumulated a considerable amount of property in the State of Washington, consisting of real estate situated in said State, and of stocks, bonds, moneys and other personal property, all of which was and is the community property of the plaintiff and his said wife under the laws of the State of Washington. The said stocks, bonds, moneys, and other personal property stood, during the period of ownership, in the name of the plaintiff. The record title (as re-
ferred to in secs. 10577 and 10578 Rem. Comp. Stat. of
60 Washington, 1922) to said real estate stood, during the period of ownership, in the name of the plaintiff, with no notice of claim of community interest filed of record, as permitted by sec. 10578 of Rem. Comp. Stat. of Washington, 1922. The income set forth in subdivisions 2, 3, 4, 5, and 6 of paragraph H next following was derived during the year 1927 from the said property hereinabove mentioned in this paragraph G.

H. The entire income in and for the year 1927 of plaintiff and/or wife and/or of the community, which was all of the income which was, under the revenue laws of the United States, required to be included in and returned as gross income, was as follows:

1. Salary of plaintiff for the year 1927 as an officer and employee of the Skinner & Eddy Corporation, a Washington corporation	$15,000.00
2. Interest on bank deposits, notes, and corporation bonds	12,881.06
3. Dividends on stock of domestic corporations	8,834.57
4. Profit from sale of real estate, stocks, and bonds	606.59
5. Profit on sale of boat "Sea Gypsy"	500.00
6. Profit on Cities Service joint venture	625.95
Total	38,448.17

None of the aforesaid income was rents, issues, or profits from property or pecuniary rights owned by the husband before marriage or acquired by him afterwards by gift, bequest, devise,
61 or descent or from property or pecuniary rights of the wife at the time of her marriage or afterwards acquired by gift, devise, or inheritance.

I. The plaintiff paid from the community funds for the year 1927, the following sums, which constitute allowable and proper deductions from gross income in the calculation of net income under the revenue act of 1926:

Interest paid	$9,097.51
Taxes paid	782.26
Charitable contributions	1,716.68
Earnest money forfeited	250.00
Bad debt allowance	325.00
Total allowable deductions	12,171.45

J. The plaintiff and his wife each filed with the defendant herein, within the time required by law, income-tax returns for the year 1927, and made a faithful and bona fide attempt to report their said income and pay the income-tax liability therein as required by the revenue act of 1926. The defendant was the proper collector with whom the same should be filed. The returns were on Form 1040, furnished to taxpayers by the Bureau of Internal Revenue. Copies of the returns filed by the plaintiff and by his wife are hereto attached and made a part hereof, marked, respectively, Exhibits A and B. In each return there was included, under proper headings, one-half of the income above described, from which there was subtracted one-half of the deductions above itemized, leaving on each return
62 a balance of $13,138.36 as their respective net incomes before deducting personal exemption and earned income credit. The tax liability of the plaintiff upon the income so reported by him, at the rates provided by the revenue act of 1926, after giving effect to plaintiff's claim of personal exemption in the sum of $1,750.00 and plaintiff's claim to earned income in the sum of $7,500.00, was $152.38, which plaintiff paid in full at the time required by law; and the tax liability of plaintiff's said wife upon the income so reported by her, at the rates provided by the revenue act of 1926, after giving effect to said wife's claim of personal exemption in the sum of $1,750.00, and her claim to earned income in the sum of $5,000.00, was the sum of $168.32, which said wife paid to the defendant at the time required by law. All of said income so reported by the plaintiff and his said wife in the year 1927 was their community income under the laws of the State of Washington. If plaintiff and his wife were entitled to divide income, less deductions, exemptions, and credits as above described, the plaintiff's return was correct and the tax liability of the plaintiff thereon was as stated on his return.

K. Upon auditing the aforesaid tax return of the plaintiff, the Commissioner of Internal Revenue determined that said return of the plaintiff was incorrect in that, according to the determination of

the commissioner, the plaintiff should have reported all of said income and claimed all of said deductions, and the tax should have been computed and paid at the rates provided in the revenue act of 1926, upon a net income of $26,276.72, less the personal exemption and earned income credit provided by law, instead of upon two net incomes of one-half of said sum. Under such a theory the tax liability of the plaintiff for 1927 would be $703.01 in addition to the amount shown on said return, or a total of $855.39. Thereupon the Commissioner of Internal Revenue notified plaintiff of this determination in accordance with the provisions of section 274 of the revenue act of 1926, and afforded the plaintiff an opportunity to appeal from this determination to the United States Board of Tax Appeals. The plaintiff waived this right, without prejudice to the right to test the matter in the courts, and the commissioner thereupon assessed against the plaintiff, on the 23rd day of August, 1928, said additional sum of $703.01 as a deficiency in income tax due by him for the year 1927, and interest in the sum of $17.92, or a total of $720.93. Said assessment was certified to the defendant, who, on the 23rd day of August, 1928, made formal notice and demand upon the plaintitff for the payment of the same.

63

L. The plaintiff thereafter, on the 23rd day of August, 1928, paid to the defendant the sum so demanded of him, and at the time of said payment protested, in writing, against the collection of said sum, notifying the defendant that the same was paid only to avoid the imposition of penalties, additional interest, and seizure and sale of property which would ensue if the demand had not been complied with.

M. On the 23rd day of August, 1928, the plaintiff filed with the defendant a claim for the refunding of said sum, a copy of which is hereto attached, made part hereof, and marked Exhibit C, which claim was rejected by the Commissioner of Internal Revenue on the 24th day of August, 1928, whereupon this suit was instituted.

64

N. The plaintiff has complied with all of the conditions precedent and other formal requirements of the statutes and rules relating to his right to institute and prosecute this suit in the manner and upon the grounds alleged in his pleadings, and all informalities have been waived. The defendant and other officers of the United States have complied with all formal requirements of the statutes and regulations in making the deficiency assessments, in collecting the same, and in rejecting plaintiff's claim for the refund.

III

Subject to the right of either party to object to the consideration of the same, as irrelevant or immaterial and without limitation upon the power of the court to take judicial notice, it is further agreed that the records of the Congress of the United States disclose the following proceedings:

A–1. The revenue act of 1921, as introduced into the House of Representatives, as reported by the Ways and Means Committee of the House, and as passed by the House, contained the following clause:

"Income received by any community shall be included in the gross income of the spouse having management and control of the community property."

2. The revenue act of 1921, as reported by the Finance Committee of the Senate, substituted for the above-quoted clause the following:

"Income received by any marital community shall be in-
65 cluded in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

3. The Finance Committee, in making its report to the Senate, discussed the foregoing provisions as follows, at page 14 of the report:

"Under an opinion of the Attorney General residents of States having a community property law enjoy marked advantage over residents of other States. Income, which in other States is taxed as a unit to the husband, is divided between husband and wife in States having community property laws, and surtaxes are correspondingly reduced. An amendment is added to this section designed to restore uniformity of treatment by providing that income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

4. The bill, as passed by the Senate, eliminated the clause above quoted and as finally enacted contained no specific reference to community income.

B–1. Committee print No. 1 of the revenue act of 1924, as introduced into the Sixty-eighth Congress and filed on December 17, 1923, was entitled as follows:

"The revenue act of 1924, containing proposed amendments to the existing law suggested by the Secretary of the Treasury."
66 and at page 58 of the bill there was included, described as new matter, the following provision:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

2. The bill, as reported by the Ways and Means Committee of the House of Representatives, eliminated the foregoing clause and contained no reference to community income.

C–1. While the Senate was considering the revenue act of 1926, the following amendment to page 12 of the bill was offered by Senator Wesley M. Jones, of the State of Washington:

"The liability of any taxpayer under any internal revenue law shall be determined, unless such taxpayer otherwise consents or re-

quests, in accordance with the Treasury Decisions, opinions of the Attorney General, and regulations made by the Commissioner or the Secretary, or by the commissioner with the approval of the Secretary, in force at the time his return was made, whether such return was made before or after the enactment of this act. As used in this subdivision, the term 'return' means, in the case of a return which has been amended, the return as finally amended."

2. On February 12, 1926, the Senate, without a record vote, adopted the foregoing amendment, the same appearing in the bill as
67 adopted by the Senate as section 1213. In conference there was substituted for this provision a clause in the language of and which became section 1212 of the revenue act of 1926.

IV

Upon the trial of this cause either party hereto may offer any such additional evidence as may be considered by such party to be pertinent, subject to all legal objections on the part of the other.

V

This agreement and stipulation shall, upon its execution, be filed in this cause and become a part of the record therein.

In witness whereof, the attorneys of record of the respective parties have executed this agreement the ——— day of November, 1928.

GEORGE DONWORTH.
ELMER E. TODD.
FRANK E. HOLMAN,
DONWORTH, TODD & HOLMAN,
Attorneys for Plaintiff.
ANTHONY SAVAGE, *U. S. Atty.*,
JOHN T. MCCUTCHEON,
Asst. U. S. Atty.,
Attorneys for Defendant.
GEORGE G. WITTER,
Special Attorney, Bureau of Internal Revenue,
Attorney for Defendant.

Here follow Exhibits A, B, and C set forth on pages 49–55.

68 [File indorsement omitted.]

Bill of exceptions as settled indorsed: Filed in the United States District Court, Western District of Washington, Southern Division, July 15, 1929.

ED. M. LAKIN, *Clerk.*
By T. W. EGGER, *Deputy.*

In United States District Court

Præcipe for transcript of record filed July 15, 1929

To the CLERK OF THE ABOVE-ENTITLED COURT:

You will please send to the United States Circuit Court of Appeals papers and record on appeal, as below enumerated:

1. Complaint.
2. Answer.
3. Memorandum decision by Judge Cushman.
4. Judgment.
5. Court's findings of fact and conclusions of law with defendant's exceptions thereto.
6. Defendant's requested conclusions of law, with defendant's exceptions thereto.
7. Stipulation and agreed statement of facts.
8. Defendant's bill of exceptions.
9. Assignments of error.
10. Petition for appeal.

69 11. All exhibits. (Clerk's note: No exhibits other than those attached to findings and conclusions and to the agreed statement of facts.)

12. Notice of appeal.
13. Order allowing appeal.
14. Citation on appeal.
15. This præcipe.

ANTHONY SAVAGE,
United States Attorney.
JOHN T. MCCUTCHEON,
Ass't United States Attorney.
GEORGE G. WITTER,
Special Attorney Int. Revenue.
T. H. LEWIS,
Special Attorney Int. Revenue.

Received a copy of the above præcipe this 15th day of July, 1929.

GEORGE DONWORTH,
Of Attorneys for Plaintiff.

[Clerk's certificate to foregoing transcript omitted in printing.]

71 [Citation in usual form showing service on George Donworth, filed July 15, 1929, omitted in printing.]

72 In United States District Court

Stipulation concerning printing of certain exhibits

It is hereby stipulated by and between the parties in the above-entitled cause that

Whereas there are three exhibits, namely, Exhibit A, Exhibit B, and Exhibit C, appearing twice in the transcript of record herein,

namely, as exhibits to the agreed statement of facts and again as exhibits to the special findings of fact made by the court; and

73 Whereas the printed record would be simplified by having said exhibits printed but once in said printed record,

Now, therefore, it is hereby stipulated that said Exhibit A, Exhibit B ,and Exhibit C be printed but once in the record to be printed in this cause and that in the place in said printed record where said exhibits are omitted, suitable reference be made to the place where they are found in said printed record.

ANTHONY SAVAGE,
United States Attorney.
JEFFREY HEIMAN,
Ass't United States Attorney,
Attorneys for Appellant.
GEORGE DONWORTH,
FRANK E. HOLMAN,
Attorneys for Appellee.

It is so ordered:

CURTIS D. WILBUR,
U. S. Circuit Judge.

74 United States Circuit Court of Appeals for the Ninth Circuit

75 *Order of submission, October 21, 1929*

Ordered appeal in above cause argued by Mr. T. H. Lewis, jr., special attorney, Bureau of Internal Revenue, counsel for the appellant, and by Mr. George Donworth, counsel for the appellee, and submitted to the court for consideration and decision, with leave to file brief of Monte M. Lemann and Charles E. Dunbar, jr., as amici curiæ on behalf of Louisiana taxpayers, and supplemental memorandum submitted by appellee concerning section 1212 of the revenue act of 1926.

76 In United States Circuit Court of Appeals, Ninth Circuit

No. 5885

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF Washington, appellant

vs.

H. G. SEABORN, APPELLEE

Order directing filing of certificate certifying certain questions or propositions of law to the Supreme Court of the United States.

NOV. 18, 1929

By direction of the Honorable Frank H. Rudkin, Frank S. Dietrich, and Curtis D. Wilbur, Circuit Judges, before whom the cause was heard, ordered: Certificate certifying certain questions or propo-

sitions of law to the Supreme Court of the United States under section 239 of the Judicial Code be filed, and that a certified copy of said certificate be forthwith forwarded by the clerk of this court to the clerk of the Supreme Court of the United States.

77 [Certificate to U. S. Supreme Court omitted in printing, as it appears under separate cover.]

81 [Clerk's certificate to foregoing transcript omitted in printing.]

82 In Supreme Court of the United States

Order granting motion to bring up entire record and cause

May 26, 1930

On consideration of the joint motion for a writ of certiorari to bring up the entire record and cause,

It is now here ordered by this court that the said motion be, and the same is hereby, granted.

[Indorsement on cover:] File No. 34623. Supreme Court U. S., October term, 1929. Term No. 492. Burns Poe, Collector, vs. H. G. Seaborn. Certified copy of transcript of record. Filed May 19, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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CHARLES ELMORE

No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1929

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, APPELLANT (BELOW)

v.

H. G. SEABORN, APPELLEE (BELOW)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT MOTION TO BRING UP THE ENTIRE RECORD

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 492

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR the District of Washington, appellant (below)

v.

H. G. SEABORN, APPELLEE (BELOW)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT MOTION TO BRING UP THE ENTIRE RECORD

Now come Burns Poe, Collector of Internal Revenue for the District of Washington, Appellant, and H. G. Seaborn, Appellee, in this cause in the United States Circuit Court of Appeals for the Ninth Circuit, now pending in this Court on questions certified by the said Circuit Court of Appeals, and move that this Honorable Court issue its writ of certiorari commanding that court to certify and send to this Court the entire record in this cause, in order that this Court may consider and decide the whole matter in controversy as upon appeal pursuant to Section 239 of the Judicial Code as amended by the Act of February 13, 1925, and Rule 37 of the Rules of this Court.

A certified transcript of the record in this case and nine printed copies thereof have been lodged

with the Clerk of this Court as exhibits to this motion.

This was a suit commenced in the United States District Court for the Western District of Washington by H. G. Seaborn, a resident of the State of Washington, against Burns Poe, as Collector of Internal Revenue for the District of Washington, to recover Federal income taxes paid under protest for the year 1927. The Collector, for the purpose of making a test case, refused to accept the separate returns filed by Seaborn and his wife, in which each had reported one-half of the community income, and made a reassessment imposing upon Seaborn alone the tax upon the entire community income. The action was begun by Seaborn to recover the difference between the amount of the tax as reassessed and paid and the amount of the tax if computed on the separate returns. From a judgment in favor of the plaintiff the Collector duly appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which court by certificate filed November 26, 1929, has certified to this Court the following questions:

> First. May a husband and wife domiciled in the State of Washington make separate returns of community income, each reporting one-half thereof, and pay taxes on such returns, in accordance with the practice which has prevailed in that State for the past eight years under the rulings and sanction of the Attorney General, the Secretary

of the Treasury and other taxing officers of the Government? Or, putting the question in another form—

Second. Must the husband make return and pay the tax on the entire community income of the husband and wife in that State, as suggested, if not decided by the Supreme Court in *United States* v. *Robbins*, 269 U. S. 315?

It is thought that the entire record will offer the Court assistance in its decision which is not available in the certificate alone, for the reason that the certificate does not show the nature of the community income or its sources; as, for example, whether it is derived from the personal earnings of one of the spouses, or from community property, or the character of the property from which it is derived. The Court may desire to know these facts and counsel feel that they will be able to present the case more satisfactorily upon the record than upon the certificate. While the questions certified cover all the decisive issues in this case, it is believed that in view of the importance of the question to the Government and to taxpayers residing in Washington, any possibility of further litigation should be avoided by a final determination in this Court of the whole controversy.

A similar motion is being made in the case of *Fred O. Goodell, Collector of Internal Revenue*, v. *I. B. Koch*, No. 882 on the docket of this Court for the present term, which is also on certificate from the Circuit Court of Appeals for the Ninth Circuit,

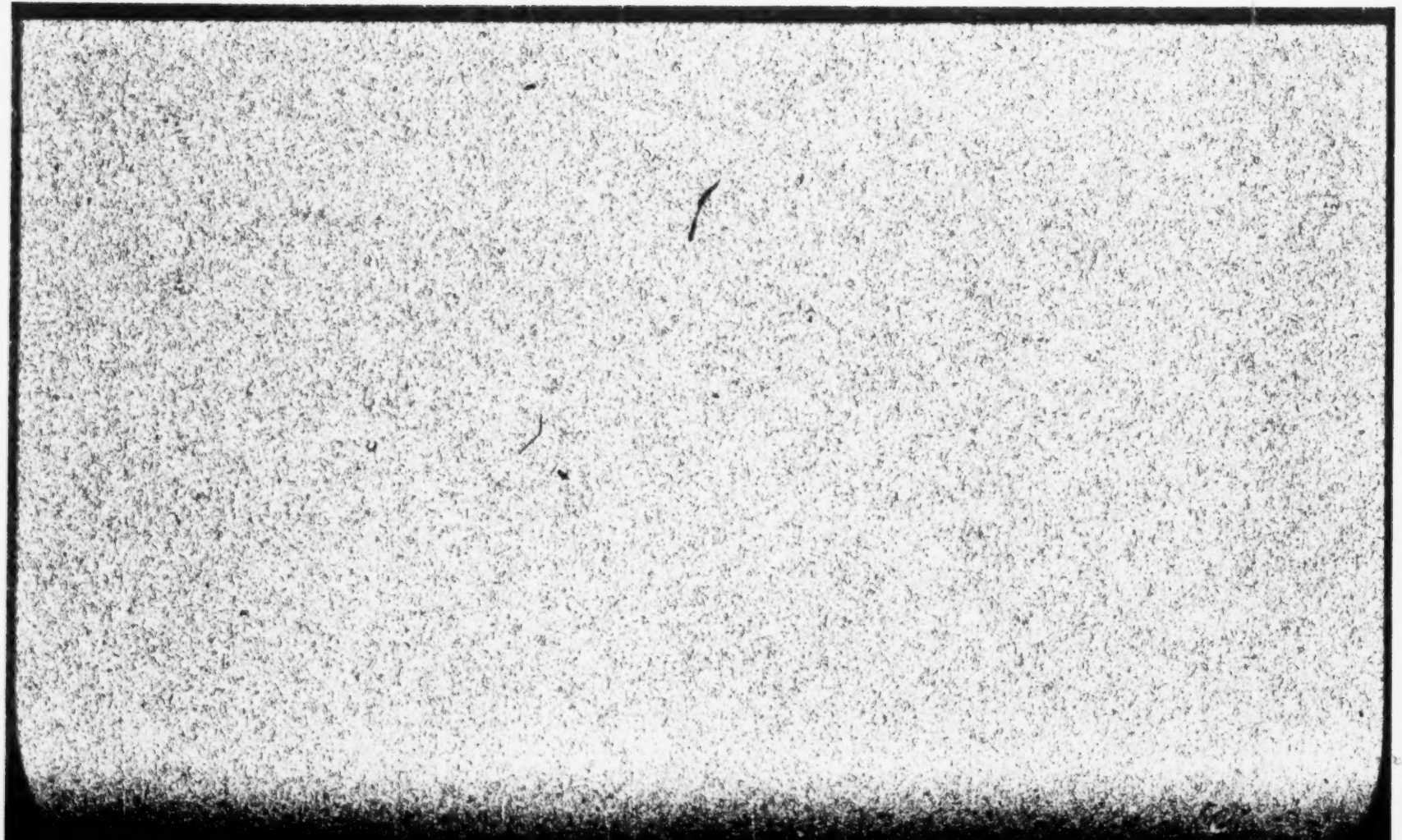
and involves the question of the taxation of community income in Arizona. The Government is also submitting simultaneously herewith a motion to advance that case, the instant case, and also, in the event certiorari is granted, two other cases, involving the taxation of community income in Texas and Louisiana (*Hopkins, Collector, Petitioner, v. Bacon*, No. 821; *Bender, Collector, Petitioner, v. Pfaff*, No. 823), for hearing in sequence on October 27 next. It is believed that it would be of assistance to the Court to have before it at the hearing the entire record in the instant case.

Wherefore, the parties hereto jointly pray that this Honorable Court issue its writ of certiorari commanding the United States Circuit Court of Appeals for the Ninth Circuit to certify and send to this Court the entire record in this cause in order that this Court may consider and decide the whole matter in controversy as upon appeal.

BURNS POE,
Collector of Internal Revenue
for the District of Washington.
By THOMAS D. THACHER,
Solicitor General.
H. G. SEABORN,
By GEORGE DONWORTH,
Attorney.

MAY, 1930.

U. S. GOVERNMENT PRINTING OFFICE 1930



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MAY 19 19
CHARLES ELMORE

NOS. ~~[illegible]~~, ~~821~~, ~~822~~, ~~823~~

In the Supreme Court of the United States

OCTOBER TERM, 1929

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON

v.

H. G. SEABORN

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

C. W. BACON

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM PFAFF

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

v.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 492

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR the District of Washington,

v.

H. G. SEABORN

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 821

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

C. W. BACON

No. 823

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

WILLIAM PFAFF

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

113961—30

No. 882

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

v.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO ADVANCE

The Solicitor General moves to advance the above-entitled cases for hearing on October 27th next.

These cases present the question whether a husband has such control over community income that he may be properly required to report all of such income in his Federal income tax return. Each case presents this question as it is affected by the local laws of a different State. The laws and judicial decisions of the States of Washington, Texas, Louisiana, and Arizona are, respectively, involved in the four cases in their order on the docket. This question is one of far-reaching importance to the taxpayers in each of these States as well as to the Government, and it is desirable that the question should be settled at the earliest practicable date.

As the cases involve the community property laws of different States, it is thought that they should not be consolidated but that it will be convenient to the Court and to counsel if they are

heard as separate cases in sequence upon the calendar.

So far as cases Nos. 821 and 823 are concerned, this motion is, of course, contingent upon the petitions for certiorari being granted. The petitions were submitted on Monday, May 19th.

All of the opposing counsel concur in this motion.

THOMAS D. THACHER,
Solicitor General.

MAY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930



Office Supreme Court, U. S.
FILED
OCT 2 1930
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1930

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON

v.

H. G. SEABORN

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE COLLECTOR

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	5
Summary of argument	5
Argument:	
I. Preliminary statement	8
II. Where the husband has control over and the right to enjoy the entire community income he is required to include it in his return for Federal income-tax purposes	10
III. Under the laws and judicial decisions of the State of Washington the husband's interest in the community income is such that he should properly be required to report the entire amount in his return; the wife's interest is not such that she should be permitted to report one-half of the community income in her return	18
Conclusion	43
Appendix	45, 59

CITATIONS

Cases:

American Surety Co. v. *Sandberg*, 244 Fed. 701	25, 30
Anderson v. *Nat'l Bank of Tacoma*, 146 Wash. 520	26, 28, 40
Atwood v. *McGrath*, 137 Wash. 400	28
Balkema v. *Grolimund*, 92 Wash. 326	31, 32, 33
Barkley v. *American Sav. Bank & Trust Co.*, 61 Wash. 415	37
Belt v. *Washington Water Power Co.*, 24 Wash. 387	29
Bellingham Motors Corp. v. *Lindberg*, 126 Wash. 684	24, 25, 35, 36
Blum v. *Smith*, 66 Wash. 192	32
Boston & M. R. R. Co. v. *United States*, 265 Fed. 578, certiorari denied, 255 U. S. 577	17
Bowers v. *Good*, 52 Wash. 384	32, 33
Calhoun v. *Leary*, 6 Wash. 17	30
Catlin v. *Mills*, 140 Wash. 1	24, 25, 26, 40
Chase National Bank v. *United States*, 278 U. S. 327	18
Coles v. *McNamara*, 131 Wash. 691	29
Conley v. *Greene*, 89 Wash. 39	29
Converse v. *LaBarge*, 92 Wash. 282	28

Cases—Continued. Page

Corliss v. *Bowles*, 281 U. S. 376 ..... 5, 6, 13–14, 15, 18, 21
Daniel v. *Daniel*, 106 Wash. 659 ..... 35, 36, 37
Denis v. *Metzenbaum*, 124 Wash. 86 29
De Phillips v. *Neslin*, 139 Wash. 51 ..... 29, 30–31
Fielding v. *Ketler*, 86 Wash. 194 33
Finn's Estate, In re, 106 Wash. 137 34
Floding v. *Denholm*, 40 Wash. 463 36
Foy v. *Pacific Power & Light Co.*, 105 Wash. 525 34
Garrozi v. *Dastas*, 204 U. S. 64 21–22
Grote-Rankin Co. v. *Brownell*, 76 Wash. 335 33
Hammond v. *Jackson*, 89 Wash. 510 ..... 31, 32
Hart's Estate, In re, 150 Wash. 482 36
Henning v. *Anderson*, 121 Wash. 53 25
Henrickson v. *Smith*, 111 Wash. 82 30
Hinkhouse v. *Wacker*, 112 Wash. 253 28
Holyoke v. *Jackson*, 3 Wash T. 235 23
Hynes v. *Colman Dock Co.*, 108 Wash. 642 34
Huyvaerts v. *Roedtz*, 105 Wash. 657 29
Johns v. *Clother*, 78 Wash. 602 30
Jones, Rosquist, Killen Co. v. *Nelson*, 98 Wash. 539 ..... 32, 33
Kaufman v. *Perkins*, 114 Wash. 40 28
Killingsworth v. *Keen*, 89 Wash. 597 ..... 31, 35
Kohny v. *Dunbar*, 21 Idaho, 258 40
Kuhn v. *Groll*, 118 Wash. 285 25
La Tourette v. *La Tourette*, 15 Ariz. 200 40
Levinson, In re, and *Greene* v. *Booth*, 1 F. (2d) 851, certiorari denied as to *Greene* v. *Booth*, 267 U. S. 598 25
Littell & Smythe Mfg. Co. v. *Miller*, 3 Wash. 480 ..... 26, 27, 40
Lucas v. *Earl*, 281 U. S. 111 16
Marston v. *Rue*, 92 Wash. 129 ..... 31, 32, 36, 40
Mattinson v. *Mattinson*, 128 Wash. 328 24
Maynard v. *Jefferson County*, 54 Wash. 351 ..... 24, 26, 34
McElroy v. *Hooper*, 70 Wash. 347 41
McFerren v. *Goldsmith-Stern Co.*, 137 Md. 573 19
Milne v. *Kane*, 64 Wash. 254 30
Motley v. *Motley*, 117 Wash. 234 37
Nelson v. *Nelson*, 131 Wash. 646 38
Nichols v. *Coolidge*, 274 U. S. 531 42
Normile v. *Denison*, 109 Wash. 205 ..... 35, 37
Olson v. *Springer*, 60 Wash. 77 32
Ostheller v. *Spokane & Inland Empire R. Co.*, 107 Wash. 678 24
Pain v. *Morrison*, 125 Wash. 267 ..... 26, 28
Palmer v. *McBride*, 115 Wash. 404 ..... 31, 32
Parker v. *Parker*, 121 Wash. 24 ..... 35, 36
Peacock v. *Ratliff*, 62 Wash. 653 ..... 29, 30
Powell v. *Powell*, 66 Wash. 561 38

Cases—Continued. Page

Reade v. *deLea*, 14 N. Mex. 442 40
Reinecke v. *Northern Trust Co.*, 278 U. S. 339 18
Rucker v. *Blair*, 32 F. (2d) 222 24
Schneider v. *Biberger*, 76 Wash. 504 34
Schramm v. *Steele*, 97 Wash. 309 ..... 23, 24, 29, 35
Shawver v. *Ewing*, 1 F. (2d) 423; certiorari denied, 267 U. S. 601 41
Smokeless Fuel Co. v. *Western United Corporation*, 19 F. (2d) 834 41
Spreckels v. *Spreckels*, 116 Cal. 339 23
Spreitzer v. *Miller*, 98 Wash. 601 28
Stewart v. *Bank of Endicott*, 82 Wash. 106 36
Strom v. *Toklas*, 78 Wash. 223 ..... 32, 35
Tibbals v. *Iffland*, 10 Wash. 451 28
Tyler v. *United States*, 281 U. S. 497 17
United States v. *Childs*, 266 U. S. 304 17
United States v. *Robbins*, 269 U. S. 315 ..... 5, 6, 9, 10, 12–13, 14, 15, 16, 18, 21, 36, 39, 42
Vanderveer v. *Hillman*, 122 Wash. 684 ..... 29, 30
Wampler v. *Beinert*, 125 Wash. 494 35
Warburton v. *White*, 176 U. S. 484 ..... 23, 24, 40
Way v. *Lyric Theater Co.*, 79 Wash. 275 ..... 24, 25
Williams v. *Beebe*, 79 Wash. 133 32
Yakima Trust Co. v. *Zintheo*, 135 Wash. 389 30

State statutes:

Compiled Statutes of Oklahoma, 1923, Sec. 11224, as amended by act of April 9, 1925 20
Compiled Statutes of Washington, 1922 (Remington's)—
Sec. 181 47
Sec. 182 47
Sec. 570 48
Sec. 989 48
Sec. 1145 48
Sec. 1342 49
Sec. 1370 49
Sec. 1419 49
Sec. 6890 50
Sec. 6891 51
Sec. 6892 51
Sec. 6893 51
Sec. 6894 52
Sec. 6895 52
Sec. 6896 53
Sec. 6900 53
Sec. 6901 53
Sec. 6902 53
Sec. 6903 54
Sec. 6904 54

Statutes—Continued. Page

Sec. 6905 ---- 54
Sec. 6906 ---- 54
Sec. 6908 ---- 54
Sec. 7348 ---- 55
Sec. 7598 ---- 56
Sec. 10572 ---- 56
Sec. 10575 ---- 57
Sec. 10577 ---- 58
Sec. 10578 ---- 58

General Statutes, Minnesota, 1923, secs. 8718–8720, 8726 -- 20
Compiled Laws of Utah, 1917, par. 4385 ---- 19

United States Statutes:

Revenue act of 1916, c. 463, sec. 1, 39 Stat. 756 ---- 11
Revenue act of 1917, c. 63, secs. 1, 201, 40 Stat. 300, 303 ---- 11
Revenue act of 1918, c. 18, secs. 210, 211, 40 Stat. 1057, 1062 - 11
Revenue act of 1924, c. 234, sec. 219 (g), 43 Stat. 253, 277 (U. S. C., title 26, sec. 960) ---- 6, 13
Revenue act of 1926, c. 27, 44 Stat. 9, 21, 32, 37, 130—

Sec. 210 (U. S. C. App., title 26, sec. 951) ---- 6, 12, 14, 45
Sec. 211 (U. S. C. App., title 26, sec. 952) ---- 6, 12, 14, 45
Sec. 219 (U. S. C. App., title 26, sec. 960) ---- 6, 15
Sec. 223 (U. S. C. App., title 26, sec. 964) ---- 45–46
Sec. 1212 (U. S. C. App., title 26, sec. 964a) ---- 9, 46–47

Miscellaneous—

McKay on Community Property—
Secs. 6, 163–171, 1172, 1183, 1184 ---- 23
32 Op. A. G. 298 ---- 8, 11
35 Op. A. G. 265 ---- 10
H. R. 350, 67th Cong., 1st sess., p. 11 ---- 10
Conference Report No. 486, 67th Cong., 1st sess., p. 21 - 10
Hearings before Ways and Means Committee, 68th Cong., 1st sess., Revenue Revision, 1924, pp. 194, 348, 349, 375, 478, 482 ---- 10
T. D. 3071, Internal Revenue Cumulative Bulletin, No. 3, p. 221 ---- 9, 11
T. D. 3138, Internal Revenue Cumulative Bulletin, No. 4, p. 238 ---- 9, 11

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 15

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR the District of Washington

v.

H. G. SEABORN

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE COLLECTOR

OPINIONS BELOW

No opinion has been rendered by the Circuit Court of Appeals for the Ninth Circuit. The decision of the District Court (R. 7) is reported in 32 F. (2d) 916.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on November 26, 1929. On May 26, 1930, this Court granted a joint motion for a writ of certiorari to bring up the entire record and cause. (R. 40.)

Jurisdiction is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented on the entire record are the same as those certified. These questions are:

> First. May a husband and wife domiciled in the State of Washington make separate returns of community income, each reporting one-half thereof, and pay taxes on such returns, in accordance with the practice which has prevailed in that State for the past eight years under the rulings and sanction of the Attorney General, the Secretary of the Treasury and other taxing officers of the Government? Or, putting the question in another form—
>
> Second. Must the husband make return and pay the tax on the entire community income of the husband and wife in that State, as suggested, if not decided by the Supreme Court in *United States* v. *Robbins,* 269 U. S. 315?

STATUTES INVOLVED

The relevant portions of the statutes involved will be found in the Appendix, *infra,* pp. 45–59.

STATEMENT

There is no dispute as to the facts in this case, a jury trial having been waived in writing and the trial court having found the facts to be as stipulated by the parties.

The appellee was married December 11, 1902, and has lived with his wife continuously since that time, being domiciled in the State of Washington. Neither had any property or pecuniary rights at

the time of their marriage and neither has since acquired any property or pecuniary rights by gift, bequest, devise, descent, or inheritance. (R. 20.)

During and prior to the year 1927 the appellee and his wife accumulated a considerable amount of property in the State of Washington, consisting of real estate located in that State, stocks, bonds, and other personal property. (R. 20.) The personal property was held in the name of the appellee and the record title to the real estate was in his name. It is agreed by the parties that all of the property in question constitutes community property under the laws of the State of Washington. (R. 20–21.)

The income of the appellee and his wife for the year 1927 consisted of the following items (R. 21):

Salary of respondent as an officer and employee of a corporation	$15,000.00
Interest on bank deposits, notes, and corporation bonds	12,881.06
Dividends on stocks of domestic corporations	8,834.57
Profit from sale of real estate, stocks, and bonds	606.59
Profit on sale of boat	500.00
Profit on Cities Service joint venture	625.95
Total	$38,448.17

None of the income listed above represented rents, issues, or profits from property owned by husband or wife at the time of their marriage or from property acquired by either of them subsequently by gift, devise, or inheritance. (R. 21.)

The income in question was reported in the separate returns filed by the appellee and his wife, one-half being reported in the return of each. Each return showed deductions representing one-half of

the total of $12,171.45 composed of the following items (R. 21):

Interest paid	$9,097.51
Taxes paid	782.26
Charitable contributions	1,716.68
Earnest money forfeited	250.00
Bad debt allowance	325.00

Each return showed a net income of $13,138.36. The appellee's return disclosed a tax liability of $152.38, and his wife's a tax liability of $168.32, both of which sums were duly paid. (R. 21, 22.)

Upon the audit of the returns the Commissioner of Internal Revenue determined that all of the income of the appellee and his wife should have been reported in the appellee's return and all the deductions claimed by him. The appellee paid under protest the additional assessment of $703.01 made against him on that theory, and upon the rejection of his claim for refund which was duly filed instituted this suit. (R. 22–23.)

The District Court held that under the laws of the State of Washington each of the spouses had an equal vested interest in the community income and that the community income was properly divided between them in separate returns. (R. 24.) From judgment in behalf of the plaintiff the Collector appealed to the Circuit Court of Appeals which, on November 26, 1929, filed its certificate with this Court. On May 26, 1930, this Court ordered the whole record to be sent up. (R. 40.)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In not holding that under the laws and judicial decisions of the State of Washington the husband has such control over the community income that he should properly be required to report all of such income in his Federal income tax return for 1927.

2. In holding that the wife has such an interest in the community income that she and her husband are permitted to divide the community income between them in separate returns.

SUMMARY OF ARGUMENT [1]

This Court in the case of *United States* v. *Robbins,* 269 U. S. 315, held that a married man domiciled with his wife in the State of California should be taxed upon all of their community income, basing its decision in part on the fact that the husband alone could dispose of the fund and exercise exclusive rights of management and enjoyment over it.

In *Corliss* v. *Bowers,* 281 U. S. 376, this Court again emphasized that the individual might be taxed on income which he had the right to control and enjoy irrespective of whether he held any title whatever to the fund from which it was derived.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds

[1] The following material to stars on p. 7 is common to all our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case* involved the constitutionality of Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), providing for the taxation of the income of revocable trusts to the grantors. Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), provides for taxing the income of certain types of trusts to the trustees, the income of other types to the beneficiaries, and the income of revocable trusts to the grantors.

Sections 210 and 211 of the Revenue Act of 1926, *infra*, p. 45, construed as similar provisions were construed in the *Robbins case*, do not require the taxation of income to the individual having purely formal rights of ownership. Their intent is that the tax shall fall upon the person exercising substantial rights of dominion and enjoyment.

In the *Robbins case* the rights of dominion and enjoyment were measured by very practical tests as to what the husband and wife could do with respect to the community income. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income. The Act should, if possible, be so construed and applied as not to give married tax-

payers residing in the community property States an undue advantage over married taxpayers residing in other States.

* * * * *[2]

Under the laws and judicial decisions of the State of Washington the husband, in addition to having a vested interest in the community property equal in all respects to his wife's interest, has full powers of management as to community personalty and substantial powers as to community realty but can not convey, mortgage, or lease the latter without the wife's consent. The only important restriction on his powers is that he can not give away a substantial amount of community property or fraudulently sequester it. This restriction is of little practical benefit to the wife for the reason that she can not (without securing a divorce) have her share of the community property removed from her husband's control or force him to give her one-half or any other portion of the community income.

While the community property is not made liable for the separate debts or torts of either, it is liable for the payment of obligations of the husband and the torts of the husband when such obligations are incurred or such torts are committed in the management of community affairs, and presumptively every act of the husband is undertaken for the benefit of the community.

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[2] See Footnote 1, p. 5.

The wife's vested interest in the community property is no more than a right to devise by will or to receive upon the dissolution of the community one-half of the then existing community property with the right in the interim to have the property devoted to such purposes as are in the honest judgment of the husband appropriate for the advancement of community interests. She has no positive powers of control and can not, to any substantial degree, interfere with the broad powers of control given to her husband.

The husband accordingly is the spouse having the right to control and manage the community property in Washington and should be made liable for Federal income tax on the entire community income. This requirement is the more reasonable in view of the fact that under the philosophy of the community property system in that State the community is a legal unit and in view of the further fact that the husband as well as the community is liable on all contracts which he makes for the community.

ARGUMENT

I

PRELIMINARY STATEMENT [3]

The Treasury Department, following two opinions of the Attorney General, 32 Op. A. G. 298,

[3] The entire argument under Points I and II is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

435, originally conceived that the characterization of the wife's interest in community property as vested or expectant determined whether the husband and wife might divide the community income between them in separate returns or whether the husband should be required to report the entire amount in his return. See T. D. 3071, Internal Revenue Cumulative Bulletin, No. 3, p. 221; T. D. 3138, Internal Revenue Cumulative Bulletin, No. 4, p. 238. It was accordingly held that a husband and wife domiciled in the States of Washington, Texas, Louisiana, Arizona, Nevada, New Mexico, and Idaho should be permitted to divide the community income between them in separate returns, while a similar privilege was denied to married taxpayers domiciled in California.[4]

Subsequently this Court, in the case of *United States* v. *Robbins,* 269 U. S. 315, indicated that the question as to whether community income shall be taxed to the husband alone or to the husband and wife in equal shares can not be made to depend solely upon whether the wife's interest is vested or expectant, and that in California, where the husband has substantially the sole right to control and enjoy the community property, the community income is properly taxed to him.

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[4] This procedure was subsequently given retroactive legislative approval as to 1925 and prior years by Section 1212 of the Revenue Act of 1926, *infra*, p. 46. That section was not intended to apply to taxes for subsequent years, and has no bearing on the question here involved.

Following the decision in the *Robbins case,* the opinions of the Attorney General as to the taxation of income in the community property States were withdrawn (35 Op. A. G. 265), with the recommendation that the Treasury Department take action which would furnish grounds for the commencement of test suits to determine the proper method of taxing community income, the case at bar being one of the cases which has resulted from such action.

II

Where the Husband Has Control Over and the Right to Enjoy the Entire Community Income He Is Required to Include It in His Return for Federal Income-Tax Purposes

In general terms the statute imposes the tax "upon the net income of every individual" without specification of what is included in these words. There is no reference in the statute to income from community property.[5] Such generality is unavoidable in Federal income tax laws intended to have uniform application throughout the States where

[5] It is of interest that while the Revenue Acts of 1921 and 1924 were being drafted it was proposed that there should be included in them a provision for the taxation of community income to the spouse having the right of management and control. See Report of the Committee on Ways and Means of the House of Representatives, Report No. 350, 67th Congress, First Session, p. 11, and Conference Report No. 486 of the same Congress, p. 21; Hearings before the Committee on Ways and Means, House of Representatives, 68th Congress, First Session, Revenue Revision, 1924, pp. 194, 348, 349, 375, 478, 482. These proposals were defeated.

the definitions of property rights and titles vary with the local laws. The view originally held in the Treasury Department and in the Department of Justice, T. D. 3071 (*supra;* T. D. 3138, *supra;* 32 Op. A. G. 298, 435, *supra*) that the wife has an interest in income from community property equal to that of her husband and should therefore be permitted to report one-half of it in her return was based upon local conceptions of title to the fund rather than of dominion and control of the income therefrom. The contention that the person who has formal title to a fund or to income therefrom must pay the tax when the power of disposition is vested in another finds no support in the language of the statute. Indeed the very generality of the words employed suggests that they are to be understood in their ordinary meaning implying dominion and control and not in any narrow, technical sense implying formal, legal, or equitable ownership.

Section 1 of the Revenue Act of 1916, c. 463, 39 Stat. 756, levied a tax "upon the entire net income received in the preceding calendar year from all sources by *every individual.*" (Italics ours.) Sections 1 and 201 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 303, imposed certain taxes upon the net income "*of every individual.*" (Italics ours.) Subsequent Revenue Acts have likewise employed the phrase "of every individual." See Sections 210 and 211 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1062, the statute involved in the *Robbins*

case, supra, and Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 45.

Nowhere in the Revenue Act of 1926 nor in any previous Revenue Act have there been set forth the proprietary rights which an individual must have in particular income to become liable for the tax thereon. The tax is imposed upon the income of individuals, and the application of this language to specific cases is to be made as they arise. In this process the *Robbins case* points the way. It does not hold that the principle of taxing income to the "owner" of the income is to be discarded, but rather that ownership in the statutory sense must be tested, in cases of community ownership, by the enjoyment of practical rights of ownership and not by words describing the interests of husband or wife or of "the community" as "vested" or "expectant," "legal" or "equitable."

In its opinion in the *Robbins case* this Court said (p. 327):

> But the question before us is with regard to the power and intent of the Revenue Act of February 24, 1919, c. 18, Title II, Part II, §§ 210, 211; 40 Stat. 1057, 1062. *Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole.* Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and

> if he wastes it in debauchery the wife has no redress. See *Garrozi* v. *Dastas,* 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. *That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole.* For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, § 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law. § 219. See Regulations 65, Art. 341. (Italics ours.)

Again, in the case of *Corliss* v. *Bowers,* 281 U. S. 376, this Court recognized that the legal estate was in the trustee and the equitable interest was in the grantor's wife, but nevertheless held the grantor to be taxable upon the income under Section 219 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), which provides for the taxation of the income from revocable trusts to the grantor. In holding this provision to be constitutional, the Court said (p. 378):

> But taxation is not so much concerned with the refinements of title as it is with actual

> command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. *Salstonstall* v. *Salstonstall,* 276 U. S. 260, 271. *Chase National Bank* v. *United States,* 278 U. S. 327. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.

Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 45, construed as the corresponding sections of the Revenue Act of 1918 were construed by the Court in the *Robbins case,* do not require the taxa-

tion of income to the individual having purely formal rights of ownership, their intention being to tax the person having the substantial right to exercise control and enjoyment of the income.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case,* as previously indicated, involved the constitutionality of a statute taxing the income of a revocable trust to the grantor. Congress has also provided for the taxation of the income of trusts to the beneficiaries in cases where the income is distributable to them and for the taxation of the income of other trusts to the trustees. See Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), and the corresponding provisions of earlier statutes. This device for the taxation of the income from trusts was in effect prior to the decisions in the *Robbins case* and the *Corliss case.* Thus Congress itself did not intend that the imposition of a tax on the net income "of every individual" should always require that the holder of the legal title be taxed or that the holder of the equitable title be taxed, but rather that in proper cases the tax should be imposed upon the person having control of the income.

Not only have the *Robbins* and the *Corliss cases* established the principle that the individual is taxed upon income over which he can exercise rights of

dominion and enjoyment rather than upon income to which he has a bare legal or equitable title, but the *Robbins case* has measured the rights of dominion and enjoyment by exceedingly practical tests. It is emphasized in that decision, for example, that the husband alone had the disposition of the fund; that he might spend it substantially as he chose, and that if he wasted it in debauchery, the wife had no redress; that his liability for his wife's support came from a different source and existed whether there was community property or not, and that the community property, while liable to be taken for his debts, was not liable to be taken for his wife's.

An application of the same principle was made in *Lucas* v. *Earl,* 281 U. S. 111, where it was held that an agreement, assumed to be valid, between husband and wife domiciled in California that each should have an equal joint interest in all their earnings could not operate to make one-half of his salary taxable to her as her income because he earned the income and had the right to collect it.

In any event, under these decisions it is settled that the rights of ownership which the person taxed must be able to exercise are substantial rights and among such substantial rights are the rights of disposing of the income or the source of the income and the right to control the use of the income.

This test rests solidly upon the controlling purpose of the law to create a national system for the taxation of incomes without discrimination between

taxpayers in the several States. The imposition of the tax "upon the net income of every individual" implies uniformity and equality in administration. But there can be neither unless the law looks through formalities of title to the rights and powers of individual taxpayers in controlling and disposing of income received. "The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." *Tyler* v. *United States,* 281 U. S. 497, 503. If married persons in the State of Washington, because of their community of interest in property which either may acquire during wedlock, are taxed upon their incomes at lower rates than married people in other States who enjoy substantially the same rights and powers with respect to the control and disposition of income, the purpose of the law will be defeated. The family is the social and economic unit upon which the burden of the tax must fall and the injustice of such inequalities in the administration of the law is apparent. Unless the tax falls ratably upon all income over which the taxpayer exercises dominion and control, uniformity in administration is unattainable and inequality becomes inevitable. Such results are to be avoided if language permits. *Boston & M. R. R. Co.* v. *United States,* 265 Fed. 578 (C. C. A. 1st), certiorari denied, 255 U. S. 577; *United States* v. *Childs,* 266 U. S. 304, 309.

The test that he who has the power of disposition should bear the burden of the tax finds support in

the general language of the statute and so to construe it effectuates the purpose of the law. Furthermore, this test is appropriate to the power and purpose of Congress in the imposition of taxes to deal with the substance of things regardless of formal legal fictions, a purpose which this Court has often recognized. *United States* v. *Robbins*, 269 U. S. 315; *Corliss* v. *Bowers*, 281 U. S. 376; *Tyler* v. *United States*, 281 U. S. 497; *Chase National Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

It is necessary, therefore, to examine the laws and the judicial decisions of the State of Washington and to determine what substantial rights of ownership the husband and wife may exercise; that is, precisely what the husband may do and what he has a right to have done with respect to community property and income, and to make a like determination with regard to the wife.

III

Under the Laws and Judicial Decisions of the State of Washington the Husband's Interest in the Community Income Is Such That He Should Be Required to Report the Entire Amount in His Return; the Wife's Interest Is Not Such That She Should Be Permitted to Report One-half of the Community Income in Her Return [6]

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[6] The following material to stars on p. 23 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

The decision must turn upon consideration of the laws of the State affecting community property and of the respective rights of the husband and wife to have control and dominion over such property and its income. But in approaching this consideration it is necessary to bear in mind that certain limitations upon the husband's power to deal, even with his own property, universally arise from the marital relationship and the husband's obligation to support his wife and make provision for her support after his death. Thus a limited right in the wife to bind the community by contracts for necessities is not a substantial right and should be disregarded, for it is comparable to the right which the wife had at common law to obtain necessities on the credit of the husband and to bind his separate property. *McFerren* v. *Goldsmith-Stern Co.*, 137 Md. 53, and cases cited. Nor is a limited right to prevent a particular disposition of the community income or property by the husband important, for similar rights are enjoyed by wives in States which do not have the community-property system. There is, for example, a Utah statute providing that no assignment of the husband's wages shall be valid unless assented to by the wife in writing. Compiled Laws of Utah, 1917, Par. 6285. It would scarcely be urged that the possession of such rights by a wife would afford sufficient reason for taxing a part of the husband's income to the wife.

Nor would it be important if the wife could prevent her husband from disposing of more than one-half of the common property by will. This gives the wife no greater right (except as to the amount) than she has in Oklahoma where the husband is prevented from bequeathing away from his wife so much of his estate that she would receive less than what would be obtained by succession at law. Act of April 9, 1925, amending Section 11224 of the Compiled Statutes of Oklahoma, Session Laws, 1925, p. 30.

Similarly, in Minnesota (omitting reference to some unimportant exceptions and special provisions) the widow is entitled—subject to the payment of the husband's debts and expenses of administration—to one-third of the personal property then belonging to his estate and one-third of all real estate (other than the homestead, in which she is entitled to a life estate) of which he shall have been seized during coverture, the conveyance of which she has not assented to in writing. General Statutes, Minnesota, 1923, Sections 8718–8720, 8726.

So far as we have been able to ascertain every State in the Union which does not have a community property law, with the exception of North Dakota and South Dakota, makes some positive provision for the widow in relation to the husband's real estate and even those States protect the wife's interest in the homestead. In practically all States, provisions which give to the wife the assur-

ance of receiving a certain proportion of the husband's real estate upon his death are accompanied by provisions which prevent him from conveying his real estate without her consent during his life in such a way as to defeat her dower or other statutory interest.

In the consideration of the local law, local "refinements of title" should be ignored and enquiry should be directed, in the language of the *Corliss case,* to "actual command" of the income taxed, so that, in accordance with the decision in the *Robbins case,* the statutory intent that he who has all the power shall bear the burden may be accomplished. This enquiry will find conclusive answer in the statutes and prevailing decisions of the State, but the subject matter is of ancient origin and the precedents should be read with the prevailing conception of the husband's right of command over community property and income always in mind. For this purpose no better statement can be found than what was said by this Court in *Garrozi* v. *Dastas,* 204 U. S. 64, 78:

> The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that in the absence of express limitation he can, after the dissolution of the community, be called to account and compelled to return to the community money which he has actually expended during the existence of the community, because, in the judgment of a court, such

expenses may be deemed to have been not suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system as prevailing, not only under the Spanish and Porto Rican Codes, but as obtaining in those countries of the continent of Europe and here where that system prevails. We need not consider whether the community was derived from the Roman law, from an express provision of the early Saxon law, or from the ancient customary law of the continent. For, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent. (See a very full citation of authority in Journal du

Palais Repertoire, verbo, communaute', 739, 741, *et seq.*)

In determining the authority of the husband as to the common property two considerations are essential: The character of the right of the wife to the common property during the existence of the marriage and the scope of the power of the husband during the same period.

With these preliminary considerations in mind, we turn to the statutes and judicial decisions of the State of Washington which disclose the rights of the spouses to control and enjoy community property and its income.

* * * * * [7]

The community property system was not native to Washington but was adopted by legislation and in many respects resembles the system of California, from which it was, in part, copied. *Warburton* v. *White,* 176 U. S. 484; *Spreckles* v. *Spreckles,* 116 Cal. 339; McKay on Community Property, Sec. 6. On the other hand, there has been developed in the State of Washington a theory of the community as a separate legal entity which is not recognized in the same form in California or the other States having the community property system. *Holyoke* v. *Jackson,* 3 Wash. T. 235; *Schramm* v. *Steele,* 97 Wash. 309; McKay on Community Property, Secs. 163–171, 1172, 1183, 1184. Thus it is said that the community is "a legal entity in which the individuality of both spouses is merged,

[7] See Footnote 6, p. 18.

in so far as the ownership of property acquired by either after marriage is concerned," and that "the title to property so acquired vests in such legal entity." *Ostheller* v. *Spokane & Inland Empire R. Co.,* 107 Wash. 678, 685. In *Mattinson* v. *Mattinson,* 128 Wash. 328, it was held that a wife as an individual might sue her husband to recover out of the community a loan made to the husband from her separate funds and presumably for the use of the community. This theory is in conflict with the theory that the husband and wife each has a vested one-half interest in the community property (*Warburton* v. *White, supra,* and *Rucker* v. *Blair* 32 F. (2d) 222 (C. C. A. 9th), and cases cited), but has influenced the course of judicial decision as to the management and control of the community property.

(A)

THE HUSBAND IS GIVEN COMPLETE AND EXCLUSIVE POWER DURING OVERTURE TO DISPOSE OF COMMUNITY PERSONAL PROPERTY, TO BIND THE COMMUNITY BY CONTRACTS CONCERNING IT, AND TO SUE AND BE SUED IN REGARD TO IT

Section 6892, Compiled Statutes, *infra.*

Way v. *Lyric Theater Co.,* 79 Wash. 275.

Catlin v. *Mills,* 140 Wash. 1.

Bellingham Motors Corp. v. *Lindberg,* 126 Wash. 684.

Maynard v. *Jefferson County,* 54 Wash. 351.

Schramm v. *Steele,* 97 Wash. 309.

Section 6892 of the Compiled Statutes of Washington, *infra,* gives the husband the exclusive and

complete right to manage, control, and dispose of community personal property with the qualification that he can not devise by will more than one-half of such property.

The Supreme Court of the State has given full effect to the provision placing the management, control, and disposition of community personal property in the hands of the husband alone.

The test as to whether his contracts relating to personal property bind the community is whether they were made in the course of his management for the benefit of the community, and not whether they were of actual benefit to the community. *Way* v. *Lyric Theater Co., supra; Catlin* v. *Mills, supra; Henning* v. *Anderson,* 121 Wash. 53; *American Surety Co.* v. *Sandberg,* 244 Fed. 701 (C. C. A. 9th).

In applying the test the Supreme Court of Washington has gone very far in upholding the husband's right to bind the community by the contracts which he makes and the obligations which he assumes. The wife's protests against his contracts do not prevent the community from becoming liable. *Bellingham Motors Corp.* v. *Lindberg, supra.*

For example, in *Henning* v. *Anderson, supra,* it was held that the husband's note given for the benefit of the corporation in which the community held stock was a community debt even though it was given to the president of the corporation who absconded without applying the proceeds to the use of the corporation for which it was intended. See also *Kuhn* v. *Groll,* 118 Wash. 285; *In re Levinson*

and Greene v. *Booth,* 1 F. (2d) 851 (C. C. A. 9th), certiorari denied as to *Greene* v. *Booth,* 267 U. S. 598.

Catlin v. *Mills,* 140 Wash. 1, *supra,* was a case where the husband executed a note and gave a mortgage on community property and later made a payment on the note after the statute of limitation had run. The court there held that in making the payment he was acting for the benefit of the community, that his payment revived the right of action on the note, and that the community was bound to pay the debt.

The husband without joinder of the wife may sue or be sued with reference to community personal property. *Maynard* v. *Jefferson County,* 54 Wash. 351, *supra.*

(B)

THE HUSBAND HAS THE MANAGEMENT AND CONTROL OF THE COMMUNITY REAL ESTATE AND MAY BIND THE COMMUNITY BY HIS CONTRACTS RELATING TO IT EXCEPT THAT HE MAY NOT SELL, CONVEY, OR MORTGAGE IT WITHOUT HIS WIFE'S CONSENT

Section 6893, Compiled Statutes, *infra.*

Littell & Smythe Mfg. Co. v. *Miller,* 3 Wash. 480.

Anderson v. *National Bank of Tacoma,* 146 Wash. 520.

Pain v. *Morrison,* 125 Wash. 267.

The husband's control over the community real estate is also substantial, notwithstanding the fact that he is prohibited by statute from selling, conveying, or encumbering it without her consent.

For example, he can contract for the erection of buildings on community land and subject it to mechanic's liens, *Littell & Smythe Mfg. Co.* v. *Miller,* 3 Wash. 480, although the wife is a necessary party in a suit to foreclose the lien. In the latter case the court said (pp. 482-483):

> The management and control of the community real property is given to the husband, and the statute speaks as though he is the only member of the community who, acting alone, can create a charge against the same for improvements, and it plainly implies that he may do so, and also create debts against the community otherwise, independent of any action upon the part of the wife, by virtue of which a judgment lien may be obtained upon the community lands. It also provides that such lands may be sold on execution issued upon a judgment for a community debt, and, if it means anything, it must mean that such debts may be created by the husband independent of any specific appointment of him by the wife as her agent to represent her in community matters, and without any participation by her in the contract.
>
> * * * * *
>
> No such powers seem to be given to the wife generally in relation to the community matters. She is only spoken of in this section as in connection with the limitation upon the husband's power to sell or convey or to encumber otherwise than as is specified in the provision therein.

It is also well settled that while the husband can not make a lease for more than one year without his wife's consent, *Spreitzer* v. *Miller,* 98 Wash. 601; *Hinkhouse* v. *Wacker,* 112 Wash. 253; *Kaufman* v. *Perkins,* 114 Wash. 40, he may assign a lease for any term. *Tibbals* v. *Iffland,* 10 Wash. 451. Similarly, in *Anderson* v. *National Bank of Tacoma,* 146 Wash. 520, *supra,* it was considered that the husband's assignment of overdue rentals, which constituted mere choses in action, passed all of the interest of the community without the signature or assent of the wife.

In *Atwood* v. *McGrath,* 137 Wash. 400, it was held that since a sheriff's certificate of sale does not vest title, the purchaser can assign the same as community personal property and without his wife joining therein, a certificate of sale being at most but evidence of an inchoate estate that may or may not ripen into an absolute title.

In *Pain* v. *Morrison,* 125 Wash. 267, *supra,* a conditional contract for the sale of community land was treated as personal property of which the husband had the lawful right to dispose in the prosecution of the affairs of the community, independently of any power or authority of the wife. On the other hand, an executory contract for the sale of land to a married man does not confer title to the land upon the community until fully performed and may be forfeited by failure of the husband to comply with the conditions of the contract. The wife is without remedy and can not complain of the forfeiture. *Converse* v. *LaBarge,* 92 Wash. 282.

The husband alone may sue for a breach of contract which if performed would have tended to increase the value of the community estate. *Belt* v. *Washington Water Power Co.*, 24 Wash. 387. He is the necessary party to all suits affecting the interests of the community. *Conley* v. *Greene*, 89 Wash. 39, *Belt* v. *Washington Water Power Co., supra.*

(C)

THE COMMUNITY PROPERTY IS LIABLE FOR ALL DEBTS INCURRED BY THE HUSBAND AND ALL TORTS COMMITTED BY HIM IN THE PROSECUTION OF COMMUNITY AFFAIRS AND THE PRESUMPTION IS THAT DEBTS INCURRED BY HIM AND TORTS COMMITTED BY HIM ARE CONNECTED WITH HIS MANAGEMENT OF THE AFFAIRS OF THE COMMUNITY

Vanderveer v. *Hillman*, 122 Wash. 684.
De Phillips v. *Neslin*, 139 Wash. 51.
Peacock v. *Ratliff*, 62 Wash. 653.
Denis v. *Metzenbaum*, 124 Wash. 86.

It is recognized that the community property is not liable for the separate debts of the husband. *Schramm* v. *Steele, supra; Huyvaerts* v. *Roedtz*, 105 Wash. 657. Nor is it liable for torts committed by the husband which were not committed in the prosecution of community affairs. *Schramm* v. *Steele, supra; Coles* v. *McNamara*, 131 Wash. 691.

The converse is also true. Every debt which is incurred by the husband in the prosecution of community affairs and every tort which is committed

by him when so engaged constitute a liability of the community. Furthermore, it is the rule that every debt incurred by the husband during the existence of the community is *prima facie* a community debt. *Calhoun* v. *Leary*, 6 Wash. 17; *Peacock* v. *Ratliff*, *supra*; *American Surety Co.* v. *Sandberg*, 244 Fed. 701 (C. C. A. 9th). Every contract entered into by the husband during the existence of the community is presumably for the benefit of the community. *Johns* v. *Clother*, 78 Wash. 602; *Peacock* v. *Ratliff*, *supra*. A husband in carrying on a business for profit is *prima facie* acting for the interest of both himself and his wife and a debt incurred in such business is *prima facie* a debt for which the community is liable. *Henrickson* v. *Smith*, 111 Wash. 82; *Yakima Trust Co.* v. *Zintheo*, 135 Wash. 389.

The community's liability for the husband's torts committed in the prosecution of community affairs is well established. In *Milne* v. *Kane*, 64 *Wash.* 254, the community was held liable to a passenger for the tort of the husband in negligently driving an automobile for hire where the automobile was operated for the benefit of the community. In *Vanderveer* v. *Hillman*, 122 Wash. 684, *supra*, it was held that the employment of an attorney to defend a civil suit involving the protection of community property, and a criminal prosecution resulting directly from acts of the husband in dealing with the community property, created a community debt. In *De Phillips* v. *Neslin*, 139 Wash.

51, *supra*, it was held that the community was liable for slander committed by the husband and his agents in charging an employee with larceny with a view of obtaining restitution of funds of a business belonging to the community; also for assault on the employee and malicious prosecution.

(D)

THE WIFE CAN NOT WITHOUT HER HUSBAND'S CONSENT MAKE ANY VALID CONTRACT IN REFERENCE TO COMMUNITY PERSONAL PROPERTY OR COMMUNITY REAL ESTATE; NOR IS THE COMMUNITY PROPERTY LIABLE FOR HER DEBTS OR TORTS EXCEPT THE DEBTS SHE MAY CONTRACT FOR NECESSITIES

Sections 6892, 6893, Compiled Statutes, *infra*.

Hammond v. *Jackson*, 89 Wash. 510.
Palmer v. *McBride*, 115 Wash. 404.
Marston v. *Rae*, 92 Wash. 129.
Killingsworth v. *Keen*, 89 Wash. 597.
Bulkeley v. *Grulimund*, 92 Wash. 326.

It is evident that under Sections 6892 and 6893 of the Compiled Statutes, *infra*, no affirmative control over community property has been given to the wife and that the only negative control given to her is the right to prevent her husband from selling, conveying, or mortgaging real property without her consent and from disposing of more than one-half of the community personality in his will. As previously pointed out, similar restrictions will be found in States which do not have a community property law.

The Supreme Court of the State of Washington has shown no disposition to construe these provisions liberally in order to give the wife positive powers of control.

The general rule is that the wife has no power to make a valid contract in reference to community property, whether real or personal. *Blum* v. *Smith,* 66 Wash. 192; *Hammond* v. *Jackson, supra; Palmer* v. *McBride, supra.* She can not sell or convey or mortgage community real estate. *Palmer* v. *McBride, supra; Olson* v. *Springer,* 60 Wash. 77. The case of *Williams* v. *Beebe,* 79 Wash. 133, which apparently laid down the rule that the wife could enter into a valid lease of community property even without her husband's consent, has been overruled by *Hammond* v. *Jackson, supra,* and *Balkema* v. *Grolimund, supra.*

The exceptions which have been made have merely served to strengthen the general rule. Section 6908 of the Compiled Statutes, *infra,* makes her liable with her husband for family expenses. Accordingly, the wife may purchase necessities to be used in the household and may bind the community to pay rent of a dwelling. *Bowers* v. *Good,* 52 Wash. 384, 389; *Strom* v. *Toklas,* 78 Wash. 223; *Jones, Rosquist, Killen Co.* v. *Nelson,* 98 Wash. 539. Similarly, when she has been deserted by her husband and there is actual necessity for so doing, she may sell community personal property. *Marston* v. *Rue, supra.* In the case last cited the Supreme Court of Washington, in holding valid the

wife's sale of an automobile after desertion by her husband, indicated that the case was an exceptional one and stated that ordinarily a person purchasing community property from the wife did so "at his own peril."

The only other exceptions generally recognized as to the wife's power to contract with reference to community property grow out of the principles of estoppel and ratification. Thus, where the husband either by express authorization, by giving the wife a power of attorney to manage community business, or by subsequent ratifications or acquiescence, approves the contract, a contract made by the wife with respect to community property can be enforced. *Bowers* v. *Good, supra; Grote-Rankin Co.* v. *Brownell,* 76 Wash. 335; *Balkema* v. *Grolimund,* 92 Wash. 326, *supra; Fielding* v. *Ketler,* 86 Wash. 194.

Not only does the wife under ordinary circumstances have no power to make a valid contract with reference to community property, but any contract which she makes is presumptively a contract as to her separate property and may be enforced against her individually. *Balkema* v. *Grolimund, supra.* In *Jones, Rosquist, Killen Co.* v. *Nelson, supra,* it was held that the wife's purchase of a piano without her husband's knowledge constituted her separate contract, upon which she and not the community was liable. Where the wife's contract is one of purchase, there is a conflict between the presumption that she makes contracts

only with respect to her separate property and the presumption that all property purchased during coverture by either spouse is community property. *In re Finn's Estate,* 106 Wash. 137.

Not only has the wife no power generally to contract with reference to community property but she has no power to enforce or collect a community claim. She may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right when such earnings are her separate property or are earned while living apart from her husband. Sections 6895 and 6896 of the Compiled Statutes, *infra; Foy* v. *Pacific Power & Light Co.,* 105 Wash. 525. No such earnings are involved in this case. (R. 21.)

In *Schneider* v. *Biberger,* 76 Wash. 504, it was held that the wife could not recover damages for personal injuries which she herself had sustained, for the reason that the claim was community property. Nor may she alone sue where the husband refuses to join as a party.[8] *Hynes* v. *Colman Dock Co.,* 108 Wash. 642. While she may join with her husband in such cases by virtue of Sections 181 and 182 of the Compiled Statutes, *infra,* she is not a necessary party. *Maynard* v. *Jefferson County,* 54 Wash. 351; *Hynes* v. *Colman Dock Co., supra.* Only after the husband has repudiated his rights and duties by deserting his wife may she alone in-

[8]An exception is also made in Sec. 7348, *infra*, as to damages caused by an intoxicated person.

stitute such an action. *Wampler* v. *Beinert,* 125 Wash. 494.

The community property is not liable for the separate debts of the wife or for her torts, except perhaps in cases where they are committed in the transaction of community business which she has been authorized to transact by her husband. Section 6904, *infra; Killingsworth* v. *Keen,* 89 Wash. 597; *Strom* v. *Toklas,* 78 Wash. 223, *supra.* See also *Schramm* v. *Steele, supra.*

(E)

THE WIFE CAN NOT RESTRAIN HER HUSBAND IF HE MISMANAGES THE COMMUNITY PROPERTY, OR REMOVE ANY PART OF IT FROM HIS CONTROL WITHOUT SECURING A DIVORCE; IF SHE DOES SECURE A DIVORCE, SHE DOES NOT NECESSARILY RECEIVE ONE-HALF OF THE COMMUNITY PROPERTY

Section 989, Compiled Statutes, *infra.*

Bellingham Motors Corp. v. *Lindberg, supra.*

Parker v. *Parker,* 121 Wash. 24.

Daniel v. *Daniel,* 106 Wash. 659.

Normile v. *Denison,* 109 Wash. 205.

From the foregoing decisions it is clear that the community is made liable for the torts of the husband committed in connection with community affairs and that it is made equally liable on his contracts relating to community property except as to contracts relating to conveyances, leases, or mortgages of real estate. The wife can not by protest prevent the community realty or personalty from

being made subject to his contracts, however ill-advised they may be. Nor can she prevent the value of her interest in the community fund from being diminished by his mismanagement, *Floding* v. *Denholm,* 40 Wash. 463; *Bellingham Motors Corp.* v. *Lindberg, supra,* but she may prevent his making an assignment of his wages. Section 7598, *infra.*

The right which she has to devise a one-half interest in the community property by will under Section 1342 of the Compiled Statutes, *infra,* does not operate as a check on her husband's powers of management. It is well settled that all that either spouse may devise by will is his or her undivided share in the community property in existence at the time of his or her death. *Daniel* v. *Daniel, supra; In re Hart's Estate,* 150 Wash. 482.

The only important restriction of the husband's power which exists even in theory is that he can not give away a substantial amount of community property or fraudulently sequester community property. *Parker* v. *Parker, supra; Marston* v. *Rue, supra; Stewart* v. *Bank of Endicott,* 82 Wash. 106. This restriction has probably not grown out of a desire to protect the wife's interest in the community property so much as it has been the consequence of the theory that the community is a legal entity possessing certain assets which must be devoted to its own use. The same restriction exists in California. *United States* v. *Robbins, supra.*

As a practical matter this restriction is of little benefit to the wife during the existence of the community. No case has been found in which the Supreme Court of Washington has held that, by a suit in equity or otherwise, a wife could wrest from her husband his control because of his extravagance, mismanagement, or negligence. Nor has any decision been found which holds that she may force him to give her one-half or any other portion of the community income. It is possible that, upon separation from her husband, the wife may be able to maintain an equitable action for separate maintenance, *Motley* v. *Motley,* 117 Wash. 234, but in such an action she sues for and, if successful, receives *maintenance* and *does not have appropriated to her use a particular share of the community income* or property. The amount awarded her may or may not be ordered to be paid from community income.

The husband is not in any case required to account to her for community property which he has given away or sequestered until the community is dissolved by a divorce or in some other method prescribed by law. *Barkley* v. *American Sav. Bank & Trust Co.,* 61 Wash. 415; *Daniel* v. *Daniel,* 106 Wash. 659, *supra; Normile* v. *Denison,* 109 Wash. 205, *supra.* So long as the wife lives with her husband she is without the means of interfering with his management of the community property. Even when the community is dissolved by divorce, she may not be sure of receiving one-

half of the community property. The court in such case has power to make such division of the community and separate property as appears just and equitable. *Nelson* v. *Nelson,* 131 Wash. 646. Where the property can not be divided without loss the court may award it all to the husband and order him to pay alimony to the wife. *Powell* v. *Powell,* 66 Wash. 561.

(F)

SUMMARY

From the foregoing it must be concluded that as a practical matter the wife's interest in the community property is no more than the right to devise by will or to receive upon the dissolution of the community one-half of the then existing community property, with the right in the interim to have the property devoted to such purposes as in the honest judgment of the husband will be beneficial to the community. She can not interfere with his contracts or bind the community by her own contracts except as to family necessities.

On the other hand, the husband, in addition to having an interest in the community equal in all respects to his wife's interest, has full power of management as to community personalty and can enter into any contract regarding community real property except that he must secure his wife's consent in conveying, mortgaging, or leasing real estate. The only material restriction on his powers which exists even in theory is

that he can not give away a substantial amount of community property or fraudulently sequester it. This limitation, however, does not confer any right on the wife so long as she lives with her husband, for she can not (without securing a divorce) have her share of the community property removed from the husband's control or force him to give her one-half or any other portion of the community income.

While the community property is not made liable for the separate debts or torts of either the husband or wife, it is liable for the payment of the obligations of the husband and the torts of the husband when such obligations are incurred or such torts are committed in the management of community affairs, and presumptively every act of the husband is done for the benefit of the community. He also is the necessary party in all actions affecting the community.

Thus while the powers of the husband over the community property in Washington may not be precisely the same as they were in California when the *Robbins case* arose, the Washington husband is the spouse who exercises all substantial control over the community property in that State, and under the decision in the *Robbins case* he should be taxed on the entire community income.

It may be claimed that the rights exercised by the husband are not different from those exercised by an agent and that an agent is not taxed upon the income of his principal. In its certificate in this case the Circuit Court of Appeals said (p. 2):

> It is likewise the established rule of decision in that State [Washington] that the power given to the husband of management and control of the community personal property is a naked power in trust for the community. It is not a power coupled with an interest and gives the husband no proprietary right or interest in the one-half of the community property, real or personal, which belongs to the wife. It differs in no respect from an agency created by a general power of attorney or other contract of agency. *Holyoke* v. *Jackson,* 3 Wash. Ter. 235; *Schramm* v. *Steele,* 97 Wash. 309.

It is true that the husband is often spoken of as the agent of the community and his power has been termed "a naked trust" for the community. In addition to the cases cited in the certificate, see *Warburton* v. *White, supra; Marston* v. *Rue, supra; Catlin* v. *Mills, supra;* and *Anderson* v. *National Bank of Tacoma,* 146 Wash. 520. This is a characteristic expression with respect to community property systems in general and is made in other jurisdictions. *Kohny* v. *Dunbar,* 21 Idaho 258; *La Tourette* v. *La Tourette,* 15 Ariz. 200; *Reade* v. *de Lea,* 14 N. Mex. 442.

But no court has gone so far as to say that under the Washington laws the husband manages the community property as agent for the wife. *Littell & Smythe Mfg. Co.* v. *Miller,* 3 Wash. 480, *supra,* p. 27. The rights of the parties are defined by statute and judicial decisions and are quite inconsistent with the strict relationship of principal and agent.

Under these circumstances we submit that expressions in opinions which speak of the husband as the representative or agent of the community are limited and controlled by statutes and decisions which fix and determine the legal characteristics of the relationship and from which it appears that the community composed of himself and his wife can exercise no authority over him as a principal. Nor can the wife be thought of as principal, in view of her complete exclusion from control and management. She can not even revoke the agency as to her share of the community property. This is not the usual rule of agency. *Shawver* v. *Ewing,* 1 F. (2d) 423 (C. C. A. 8th), certiorari denied, 267 U. S. 601.

Again, the husband may be prohibited from deliberately defrauding his wife of the community estate but unlike an agent he is not required to use ordinary care in discharging his duties. In *McElroy* v. *Hooper,* 70 Wash. 347, it was said that in Washington the community profits by the husband's good judgment and "must bear the loss of his mistakes." No accounting can be asked of him during the existence of the agency, whereas an agent is accountable to his principal. *Smokeless Fuel Co.* v. *Western United Corporation,* 19 F. (2d) 834 (C. C. A. 4th).

The property involved in the present litigation—that is, the income accruing to the community during the year 1927—is personal property over which the husband has "the management and control

* * * with a like power of disposition as he has of his separate personal property, except that he shall not devise by will more than one-half thereof." Section 6892 of the Compiled Statutes, *infra*. It may well be said that if Congress has failed to deal with this income from the viewpoint of the practical results which flow from dominion and control it has in this instance departed from the theory that "taxes are very real things and statutes imposing them are estimated by practical results." *Nichols* v. *Coolidge*, 274 U. S. 531, 541.

The practical difficulties incident to the assessment and collection of the tax, if it is to be assessed against the wife, are obvious. *United States* v. *Robbins, supra*. The wife can not pay the tax assessed against her out of the income taxed. She has no power to appropriate any of the community property to the payment of the tax and to collect it out of her separate property, if she has any, is quite inconsistent with the scheme of the community laws.

The case is not to be decided according to the extent of the negative control of the wife over the community property, or her technical present interest in it, or the ultimate rights which may vest upon dissolution of the community. Neither the corpus of the community property nor the rights of the respective spouses is the subject of the tax. The tax is based on the current receipt of income which under the local statute is subject to the management and control of the husband with a like power of disposition as he has

of his separate estate except that he may not dispose of more than half thereof by will.

CONCLUSION

It is therefore urged that the judgment of the District Court for the Western District of Washington should be reversed.

Respectfully submitted.

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APPENDIX

UNITED STATES STATUTES

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21–22, 37, 130, provides in part, as follows:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum; * * *. (U. S. C. App., Title 26, Sec. 951.)
>
> SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *. (U. S. C. App., Title 26, Sec. 952.)
>
> SEC. 223. (a) The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. (U. S. C. App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such in-

come shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964 a.)

WASHINGTON STATUTES

Remington's Compiled Statutes of Washington, 1922, provide in part as follows:[1]

SEC. 181. HUSBAND AND WIFE MUST JOIN.—EXCEPTION.—When a married woman is a party, her husband must be joined with her, except—

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone;

2. When the action is between herself and her husband, she may sue or be sued alone;

3. When she is living separate and apart from her husband, she may sue or be sued alone.

SEC. 182. WHEN HUSBAND AND WIFE MAY JOIN.—Husband and wife may join in all causes of action arising from injuries to the person or character of either or both of them, or from injuries to the property of either or both of them, or arising out of any contract in favor of either or both of them. If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also. And she may defend in

[1] Where there is no indication to the contrary all of the provisions quoted herein also appeared in the Code of 1881 or were enacted between 1881 and 1902, the date of the marriage of the respondent and his wife.

all cases in which she is interested, whether she is sued with her husband or not.

SEC. 570. SEPARATE PROPERTY OF WIFE EXEMPT.—All real and personal estate belonging to any married woman at the time of her marriage, and all which she may have acquired subsequently to such marriage, or to which she shall hereafter become entitled in her own right, and all her personal earnings, and all the issues, rents and profits of such real estate, shall be exempt from attachment and execution upon any liability or judgment against the husband, so long as she or any minor heir of her body shall be living: Provided, that her separate property shall be liable for debts owing by her at the time of her marriage.

SEC. 989. DECREE—DISPOSITION OF PROPERTY.—In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage.

SEC. 1145. COMMUNITY INTEREST, HOW SUBJECTED.—The claim of lien, when filed as required by this chapter, shall be notice to the husband or wife of the person who appears of record to be the owner of the property

sought to be charged with the lien, and shall subject all the community interest of both husband and wife to said lien.

SEC. 1342. DESCENT OF COMMUNITY PROPERTY.—Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

SEC. 1370. COMMUNITY INTERESTS.—This act shall apply to community real property and also to separate estate; and upon the death of either husband or wife, title of all community real property shall vest immediately in the person or persons to whom the same shall go, pass, descend or be devised, as provided in section 1342, subject to all the charges mentioned in section 1366 of this act.

SEC. 1419.[2] COMMUNITY PROPERTY, HOW ADMINISTERED.—A surviving spouse shall be

[2] Enacted in 1917.

entitled to administer upon the community property, notwithstanding any provisions of the will to the contrary, if the court find such spouse to be otherwise qualified; but if such surviving spouse do not make application for such appointment within forty days immediately following the death of the deceased spouse, he or she shall be considered as having waived his or her right to administer upon such community property. If any person, other than the surviving spouse, make application for letters testamentary on such property, prior to the expiration of such forty days, then the court, before making any such appointment, shall require notice of such application to be given the said surviving spouse, for such time and in such manner as the court may determine, unless such applicant show to the satisfaction of the court that there is no surviving spouse or that he or she has in writing waived the right to administer upon such community property.

SEC. 6890. SEPARATE PROPERTY OF HUSBAND.—Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

SEC. 6891. SEPARATE PROPERTY OF WIFE.—The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.

SEC. 6892. COMMUNITY PROPERTY DEFINED—HUSBAND'S CONTROL OF PERSONALTY.—Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

SEC. 6893. COMMUNITY REALTY, CONVEYANCE OF, ETC.—The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: *Provided, however,* That all such community real estate shall be subject to the liens of mechanics and others for labor and

materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon.

SEC. 6894. AGREEMENTS AS TO STATUS OF.—Nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposititon of the whole or any portion of the community property, then owned by them or afterward to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged, and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: *Provided, however,* That such agreement shall not derogate from the rights of creditors nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud, or under some other recognized head of equity jurisdiction, at the suit of either party.

SEC. 6895. SEPARATE EARNINGS OF WIFE, ETC.—A wife may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right, and she may prosecute and

defend all actions at law for the preservation and protection of her rights and property as if unmarried.

SEC. 6896. EARNINGS OF WIFE AND MINOR CHILDREN.—The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife.

SEC. 6900. MARRIED PERSONS MAY ACQUIRE AND HOLD PROPERTY, HOW.—Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued as if he or she were unmarried.

SEC. 6901. CIVIL DISABILITIES OF WIFE ABOLISHED.—All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has: Provided always, that nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law.

SEC. 6902. CONTRACTS AND LIABILITIES OF WIFE.—Contracts may be made by wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried.

SEC. 6903. MAY SUE EACH OTHER.—Should either husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried.

SEC. 6904. INJURIES COMMITTED BY MARRIED WOMAN, LIABILITY FOR.—For all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in case where he would be jointly responsible with her if the marriage did not exist.

SEC. 6905. ANTENUPTIAL AND SEPARATE DEBTS.—Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other.

SEC. 6906. FAMILY EXPENSES, LIABILITY FOR.—The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

SEC. 6908.[3] FAMILY DESERTION.—Every person who—

1st. Having any child under the age of sixteen years dependent upon him or her for care, education or support, deserts such

[3] Enacted in 1913.

child in any manner whatever, with intent to abandon it;

2d. Willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his or her child or children or ward or wards;

3d. Having sufficient ability to provide for his wife's support, or who is unable to earn the means for such wife's support, who willfully abandons and leaves his wife in a destitute condition, or who refuses or neglects to provide such wife with necessary food, clothing, shelter, or medical attendance, unless by her misconduct he is justified in abandoning her,

Shall be guilty of a gross misdemeanor.

SEC. 7348.[4] ACTION FOR INJURIES CAUSED BY INTOXICATED PERSON.—Every husband, wife, child, parent, guardian, employee, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action, in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication of such person, for all damages sustained, and the same may be recovered in a civil action in any court of competent jurisdiction. On the trial of such action, the plaintiff or plaintiffs must prove that such intoxicating liquors were sold under circumstances sufficient to lead a man

[4] Enacted in 1905.

of ordinary intelligence to believe that such sale would probably result in intoxication. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use, and all damages recovered by a minor under this chapter shall be paid either to such minor or to such person in trust for him, and on such terms as the court may direct. In case of the death of either party, the action and right of action to or against his executor or administrator shall survive.

SEC. 7598.[5] MARRIED MAN—CONSENT OF WIFE NECESSARY.—No assignment of, or order for, wages to be earned in the future shall be valid, when made by a married man, unless the written consent of his wife to the making of such assignment or order is attached thereto.

SEC. 10572. CONVEYANCES BETWEEN HUSBAND AND WIFE.—A husband may give, grant, sell, or convey directly to his wife, and a wife may give, grant, sell, or convey directly to her husband his or her community right, title, interest, or estate in all or any portion of their community real property. And every deed made from husband to wife, or from wife to husband, shall operate to divest the real estate therein recited from any or every claim or demand as community property, and shall vest the same in the grantee as separate property. The grantor in all such deeds, or the party releasing such community interest or estate, shall sign, seal,

[5] Enacted in 1909.

execute and acknowledge the deed as a single person, without the joinder therein of the married party therein named as grantee: Provided, however, that the conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift, or conveyance: And provided further, that any deeds of gift conveyances or releases of community estate by or between husband and wife heretofore made, but in which the husband and wife have not joined as grantors, said deeds, where made in good faith and without intent to hinder, delay, or defraud creditors, shall be and the same are hereby fully legalized as valid and binding.

SEC. 10575. POWER OF ATTORNEY TO CONVEY COMMUNITY PROPERTY.—A husband may make and execute a letter of attorney to the wife, or the wife may make and execute a letter of attorney to the husband, authorizing the sale or other disposition of his or her community interest or estate in the community property, and as such attorney in fact to sign the name of such husband or wife to any deed, conveyance, mortgage, lease, or other encumbrance, or to any instrument necessary to be executed by which the property conveyed or transferred shall be released from any claim as community property. And either said husband or said wife may make and execute a letter of attorney to any third person to join with the other in the conveyance of any interest either in

separate real estate of either, or in the community estate held by such husband or wife in any real property. And both husband and wife owning community property may jointly execute a power of attorney to a third person authorizing the sale, encumbrance, or other disposition of community real property, and so execute the necessary conveyance or transfer of said real estate.

SEC. 10577. BONA FIDE PURCHASER PROTECTED BY RECORD TITLE, WHEN.—Whenever any person, married or single, having in his or her name the legal title of record to any real estate, shall sell or dispose of the same to an actual bona fide purchaser, a deed of such real estate from the person holding such legal record title to such actual bona fide purchaser shall be sufficient to convey to and vest in such purchaser the full legal and equitable title to such real estate free and clear of any and all claims of any and all persons whatsoever not appearing of record in the auditor's office of the county in which such real estate is situated.

SEC. 10578. CLAIM IN COMMUNITY REALTY TO BE FILED, WHEN.—A husband or wife having an interest in real estate, by virtue of the marriage relation, the legal title of record to which real estate is or shall be held by the other, may protect such interest from sale or disposition by the husband or wife, as the case may be, in whose name the legal title is held, by causing to be filed and recorded in the auditor's office of the county in which

such real estate is situated, an instrument in writing setting forth that the person filing such instrument is the husband or wife, as the case may be, of the person holding the legal title to the real estate in question, describing such real estate and the claimant's interest therein; and when thus presented for record such instrument shall be filed and recorded by the auditor of the county in which such real estate is situated, in the same manner and with like effect as regards notice to all the world, as deeds of real estate are filed and recorded. And if either husband or wife fails to cause such an instrument to be filed in the auditor's office in the county in which real estate is situated the legal title to which is held by the other, within a period of ninety days from the date when such legal title has been made a matter of record, any actual bona fide purchaser of such real estate from the person in whose name the legal title stands of record, receiving a deed of such real estate from the person thus holding the legal title, shall be deemed and held to have received the full legal and equitable title to such real estate free and clear of all claim of the other spouse.

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Nos. 15, 106, 84, 86

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In the Supreme Court of the United States

OCTOBER TERM, 1930

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON

v.

H. G. SEABORN

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

v.

I. B. KOCH

ON CERTFICATES FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

C. W. BACON

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM PFAFF

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM REGARDING PRESENT PRACTICE AS TO ESTATE TAXES IN COMMUNITY PROPERTY STATES

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 15

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR the District of Washington

v.

H. G. SEABORN

No. 106

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

v.

I. B. KOCH

ON CERTIFICATES FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

C. W. BACON

No. 86

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

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MEMORANDUM REGARDING PRESENT PRACTICE AS TO ESTATE TAXES IN COMMUNITY PROPERTY STATES

19396—30

TREASURY DEPARTMENT,
BUREAU OF INTERNAL REVENUE,
Washington, October 22, 1930.

GC:C:FFT
229057

Hon. G. A. YOUNGQUIST,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

SIR: During the argument of the case of *Poe, Collector,* v. *Seaborn* in the Supreme Court yesterday, Mr. Justice Sutherland asked the Solicitor General concerning the practice of the Treasury Department in the administration of the Federal estate tax in the eight community property states. You have requested a short memorandum on this subject.

You are advised that the opinion of the Attorney General Palmer dated March 3, 1921, which was published as T. D. 3138, Volume 23, Treasury Decisions, page 238, has been consistently followed (except for a short period with respect to the State of California) and represents the practice of the Department to-day. In other words, for estate-tax purposes in the States of Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada there is included in the gross estate of a deceased spouse one-half only of the community property of the husband and wife domiciled therein.

It will be noted that under that opinion a different rule was applied as to the State of California.

In that state the entire value of the community property was included in the gross estate of a deceased husband. That practice was consistently followed until the decision in the case of *Wardell* v. *Blum*, C. C. A. 9th, 276 Fed. 226, certiorari denied 258 U. S. 617. In that case it was held that only one-half of the community property should be included in the gross estate of the husband. After the decision of the Supreme Court in the *Robbins case* the practice of including the value of all community property in the gross estate of the husband was resumed. This was sustained in the case of *Talcott* v. *United States*, C. C. A. 9th, 23 Fed. (2d) 897, certiorari denied 277 U. S. 604. This represents the practice of the Department to-day with respect to the State of California.

A more detailed summary of the practice concerning this subject will be found in Commerce Clearing House 1930 Standard Federal Tax Service, Volume II, page 1827, paragraph 2052.

Respectfully,

C. M. CHAREST,
General Counsel.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1930.

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Nos. 15, 106, 84, 86

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM REGARDING THE LEGISLATIVE HISTORY OF SECTION 1212 OF THE REVENUE ACT OF 1926

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 15

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR the District of Washington

v.

H. G. SEABORN

No. 106

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v.

WILLIAM PFAFF

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

19414—30

MEMORANDUM REGARDING THE LEGISLATIVE HISTORY OF SECTION 1212 OF THE REVENUE ACT OF 1926

The report of the Ways and Means Committee of the House accompanying the Revenue Bill of 1926 (House Report No. 1, 69th Congress, 1st Session) is dated December 7, 1925, and shows that no community property legislation was included in the Bill as reported to the House. The report of the Senate Committee on Finance (Senate Report No. 52, 69th Congress, 1st Session) is dated January 16, 1926, twelve days after this Court rendered its decision in *United States* v. *Robbins,* 269 U. S. 315. This report shows that no community property legislation was contained in the bill at that time.

The first provision in the Revenue Bill of 1926 having a direct bearing on the community property situation was embodied in an amendment to the Bill which was proposed by Senator Jones of Washington on the floor of the Senate on February 12, 1926. The Congressional Record for that date reports the following proceedings (67 Cong. Rec., Part 4, p. 3895):

> Mr. JONES of Washington. I offer an amendment, which I understand the Senator in charge of the bill is willing to send to conference for consideration by the conferees.
>
> Mr. SMOOT. With that statement, I have no objection to the insertion of the amendment in the bill.
>
> The VICE PRESIDENT. The clerk will state the amendment.

The CHIEF CLERK. On page 334, after line 10, after the amendments heretofore agreed to, insert:

RETROACTIVE REGULATIONS

SEC. 1213. The liability of any taxpayer under any internal revenue law shall be determined (unless such taxpayer otherwise consents or requests) in accordance with the Treasury decisions, opinions of the Attorney General, and regulations made by the commissioner or the Secretary, or by the commissioner with the approval of the Secretary, in force at the time his return was made, whether such return was made before or after the enactment of this act. As used in this subdivision the term "return" means, in the case of a return which has been amended, the return as finally amended.

The VICE PRESIDENT. The question is on agreeing to the amendment.

The amendment was agreed to.

This amendment became Senate Amendment No. 204. The Bill, with the Senate amendments, was thereafter referred to the Committee of Conference. Senate Amendment 204 was objected to by the House conferees with the result that the more limited provisions which subsequently became Section 1212 of the Revenue Act of 1926 (see appendix, *infra*) were agreed to as a substitute for the Senate amendment. This action is shown by the following extracts from the Conference Report to

the House (House Report No. 356, 69th Congress, 1st Session, pp. 29, 59–60):

> Amendment numbered 204:
>
> That the House recede from its disagreement to the amendment of the Senate numbered 204, and agree to the same with an amendment as follows:
>
> In lieu of the matter proposed to be inserted by the Senate amendment insert the following:
>
> *Community property*
>
> *Sec. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse* and a period.
>
> And the Senate agree to the same.
>
> * * * * *
>
> Amendment No. 204: This amendment was intended to provide for retroactive validation of all Treasury decisions, opinions of the Attorney General, and regulations of the Treasury Department made under prior revenue acts; it provided that the liability of any taxpayer under any internal revenue law

> should be determined in accordance with the Treasury decision, opinion of the Attorney General, and Treasury regulations in force at the time the taxpayer's return was made. The House recedes with an amendment striking out the Senate provision and inserting a section providing that income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. The section as agreed to also provides that any spouse who elects so to return such income shall not be entitled to refund on the ground that such income should have been returned by the other spouse.

In reporting the Conference Bill to the House, Representative Green, of Iowa (one of the Conference Managers), made the following statement in connection with various retroactive provisions in the Revenue Act of 1926, including Section 1212 of that Act (67 Cong. Rec., Part 4, p. 4421):

> The number of these amendments was caused by circumstances which arose after the House passed the bill. There were four decisions of various courts—the Supreme Court, the Court of Claims, the Board of Tax Appeals—which would have necessitated a complete change of the regulations of the Treasury Department and going back for

> five or six years on some of the most complicated matters ever submitted unless we put in this bill a retroactive provision closing up those cases on the basis of the settlement by the taxpayer and in accordance with the rules under which the Treasury Department had been acting—rules and regulations which the House itself had practically sanctioned, because it attempted to make no change in them, believed them to be valid, to be enforcible, and on the whole believed them to be the best ones that could be enacted. I refer now to the community-property decision of the Supreme Court [the *Robbins case*], the installment-sales decision on the part of the Board of Tax Appeals, the decision of the Supreme Court with reference to the year when taxes should be credited in determining invested capital, and the decision of the Court of Claims with reference to the force and effect of the statute of limitations

This presentation of the legislative history of Section 1212 of the Revenue Act of 1926 makes it clear that that Section had its inception after the decision of this Court in *United States* v. *Robbins, supra,* and as a result of that decision.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1930.

APPENDIX

Section 1212 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 130 (U. S. C. App., Title 26, Sec. 964a) provides:

> SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse.

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On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit and on Certiorari

BRIEF OF H. G. SEABORN
(herein called Appellee)

GEORGE DONWORTH,
ELMER E. TODD,
FRANK E. HOLMAN,
CHARLES T. DONWORTH,
Attorneys for Appellee.

Hoge Building,
Seattle, Washington.

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SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Statement	3
Trial Court's Conclusions of Law	7
Federal Statutes involved	8
Washington Statutes involved	10, 135-143
Contentions of Appellee Seaborn	10
Summary of Argument	11-20
Argument	21-133
Point I—The nature of the community property law of Washington and its binding effect as a matter of State sovereignty	21-51
Subdivision A—Description of community property system of Washington, showing husband and wife equally vested with ownership and enjoyment, same being free from liability from husband's separate obligations or separate torts	21
Subdivision B—Equal and vested ownership of wife evidenced by direct language of statutory sections and by numerous expressions in other sections of statute	33
Subdivision C—Washington statutes relating to wills and descent expressly declare each spouse to be owner of one-half, and provide for disposition by will or inheritance accordingly	34
Subdivision D—Upon death of either spouse, state law recognizes title of survivor to one-half of community property is mere continuation of title already existing	36
Federal authorities recognize this continuous title in assessing Federal estate tax	36, 37
Subdivision E—Community property in Washington consists of earnings of husband, earnings of wife, recoveries for personal injuries suffered by either, and accumulations of property after marriage	38

Page

Subdivision F—Statutes and decisions in Washington afford wife ample remedies for any interference with her community rights 40

Subdivision G—Vested and equal interest of wife recognized not only by State decisions, but also by Federal decisions and rulings 43

Subdivision H—This Court will follow State decisions interpreting State laws on property and property rights, whole subject of domestic relations belonging to laws of the states 47

Point II—Meaning and effect of Revenue Act of 1926 51-61

Subdivision A—Husbands and wives as individuals authorized and permitted by Act of 1926 to make separate returns, returning one-half each of community income 51

Subdivision B—Association of husband and wife in marriage relation not to be classified as trust, corporation, joint stock company or association. Applicable provisions of Act are those relating to individuals or possibly partnerships 53

Subdivision C—Congress having no power to legislate as to domestic relations or property titles, State laws and decisions are final on question of ownership in ascertaining net income of every individual. Whether or not Congress could constitutionally depart from State law governing ownership, it has not attempted to do so in Revenue Act 58

Point III—Discussion of departmental and legislative history in connection with filing of separate returns by husbands and wives in community property states 61-67

Subdivision A—Brief review of departmental practical construction of revenue acts concerning community income, and refusal of Congress to change language thereof 61

Subdivision B—In construing Act of Congress, uniform executive construction and administrative practice given great weight 64

Page

Re-enactment of statute in language which previously received uniform executive construction amounts to adoption by Congress of that construction 65-67

Chronological Table of doings of Departments and Congress, Appendix B 145

Point IV—Decision in *United States v. Robbins* not in point in present case 67-73

Subdivision A—Fundamental differences between community system in Washington and that of California make opinion in *Robbins* case not applicable 67

Subdivision B—Further considerations showing *Robbins* case did not decide anything involved in present case 71

Long continued executive construction of Revenue Act as to other community property states not applicable in case of California, and this distinction obvious in *Robbins* case 71-73

Point V—Revenue statutes not to be construed to enlarge their scope; all doubts resolve against Government and in favor of taxpayer 73-74

Point VI—Even if Congress had power to impose income tax on husband for income owned by both spouses under community system, no such tax could be imposed till Congress affirmatively so legislates 75

Point VII—Construction of Revenue Act of 1926 urged by appellant would render that Act unconstitutional 76-90

Duty of Court to construe the Act so as to preserve its constitutionality and also to avoid grave doubt of constitutionality 76-90

Subdivision A—Statement of constitutional provisions infringed by construing Revenue Act as claimed by appellant 76

Subdivision B—Taxes on rents, income or profits of real estate and personal property are direct taxes and must be imposed on owner 79-89

Income tax cannot be levied without apportionment against only one of two owners, as Sixteenth Amendment does not change direct nature of tax 79-89

Page

General discussion of constitutional requirements applicable to income taxes 79-89

Subdivision C—Duty of Court to construe Acts of Congress so as to avoid grave doubts of constitutionality 89

Point VIII—Answer to contentions asserted in appellant's brief 91-128

Subdivision A—Answer to appellant's Point II asserting that, where husband has control and right to enjoy entire community income, he is required to include it in his return for income tax 91

Subdivision B—Answer to appellant's contention that the *Robbins* case, *Corliss v. Bowers* and *Lucas v. Earl* authorize view that management and control, rather than ownership, are contemplated as basis of income taxation 92

Subdivision C—Consideration of Sec. 223 of Revenue Act giving husband and wife option of filing joint return or separate individual returns 97

Subdivision D—Appellant's definition as to what constitutes ownership would defeat appellant's contention that husband is sole owner of community property and income 98

Subdivision E—Answer to appellant's contention that limited restriction on husband's power of disposition of community income or property not important 99

Subdivision F—Answer to appellant's contention that it is not important that wife can prevent husband from disposing of more than half of the property by will 100

Subdivision G—Answer to appellant's contention that prime consideration should not be refinements of title but actual command of income 101

Subdivision H—Answer to appellant's contention that permission to divide community income between husband and wife would be unfair to taxpayers in states not having community system 102

Subdivision I—Answer to appellant's citation of Washington decisions viewing community of husband and wife as entity 106

Page

Subdivision J—Answer to appellant's contention as to effect of particular sections of Washington community property law regarding powers of husband concerning community property....109

Subdivision K—Answer to appellant's contention that wife cannot, without husband's consent, make any valid contract with reference to community property, and cannot restrain husband if he mismanages community property....112

Subdivision L—Further answer to appellant's contention regarding alleged command or dominion on husband's part over community property....118

Subdivision M—Answer to appellant's contention with reference to practical difficulties in collection of tax if income is divided between husband and wife....125

Subdivision N—Answer to appellant's contention regarding purpose of Congress to create a national system of taxation....126

Further answer to appellant's contention claiming ownership of community property by husband....127

Partnerships between husband and wife lawful under the laws of any "common law" state are specifically recognized by Treasury Department, and incomes of husband and wife in such partnerships are divided between them as individuals, regardless of the fact that husband is manager....129

In Washington, husband and wife cannot become common partners, the statutory quasi-partnership of community system being exclusive....130

Point IX—Clear line of demarcation as to income taxes between State and Federal powers....131-132

Vital importance that powers of each sovereignty be upheld....131-132

Conclusion....133

Appendix A—Setting forth community property statutes of Washington....135-143

Appendix B—Chronological table of important facts regarding present controversy, from 1869 to present time....145-156

TABLE OF CITATIONS

UNITED STATES SUPREME COURT CASES

	Page
American Net & Twine Co. v. Worthington, 141 U. S. 468	74
Arnett v. Reade, 220 U. S. 311	44, 116, 124, 128
Bank of America v. Banks, 101 U. S. 240	60
Benziger v. United States, 192 U. S. 38	74
Blodgett v. Holden, 275 U. S. 142	90
Brewster v. Gage, 280 U. S. 327	66
Bromley v. McCaughn, 280 U. S. 124	16, 82, 83, 86, 92, 122
Bucher v. Cheshire R. Co., 125 U. S. 555	48
Buchser v. Buchser, 231 U. S. 157	27, 35, 47, 68, 97, 128
Burgess v. Seligman, 107 U. S. 20	48
Chase National Bank v. United States, 278 U. S. 327	122
Copper Queen Mining Co. v. Arizona Board of Equalization, 206 U. S. 474	65
Corliss v. Bowers, 281 U. S. 376	17, 92, 95, 123
Crocker v. Malley, 249 U. S. 223	74
DeVaughn v. Hutchinson, 165 U. S. 566	47
Eidman v. Martinez, 184 U. S. 578	74
Eisner v. Macomber, 252 U. S. 189	16, 79, 80, 82, 92
Elmendorf v. Taylor, 10 Wheat. 152	47
Glenn v. Johnson, 18 Wall. 476	59
Gould v. Gould, 245 U. S. 151	74
Heald v. District of Columbia, 254 U. S. 20	66
Hines Yellow Pines Trustees v. Martin, 268 U. S. 458	48
Home Savings Bank v. Des Moines, 205 U. S. 503	84
Jackson v. Jackson, 91 U. S. 122	59
Jacobs v. Pritchard, 223 U. S. 200	66
Knights v. Meyer, 265 U. S. 30	48
Knowlton v. Moore, 178 U. S. 41	122
Komada v. United States, 215 U. S. 392	66
Lash's Products Co. v. United States, 278 U. S. 175	66
Lewellyn v. Frick, 268 U. S. 238	88
Lippincott v. Mitchell, 94 U. S. 767	47
Lucas v. American Code Co., 280 U. S. 445	65
Lucas v. Earl, 281 U. S. 111	17, 92, 95, 96, 130
Luckenbach S.S. Co. v. United States, 280 U. S. 173	65
M'Culloch v. Maryland, 4 Wheat. 316	131

UNITED STATES SUPREME COURT CASES (Continued)

Page

Middleton v. McGrew, 23 Howard 45 47
National Lead Co. v. United States, 252 U. S. 140 66
Neilson v. Kilgore, 145 U. S. 487 51
New York v. Illinois, 278 U. S. 367 65
Nichols v. Coolidge, 274 U. S. 531 87
Ohio v. Agler, 280 U. S. 379 48
Panama R. Co. v. Johnson, 264 U. S. 375 90
Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 158 U. S. 601 ..... 15, 77, 79, 86, 92, 103, 145
Provost v. United States, 269 U. S. 443 66
Reinecke v. Gardner, 277 U. S. 239 74
Reinecke v. Northern Trust Co., 278 U. S. 339 ..... 90, 122
Robbins case (See *United States v. Robbins*)
Shwab v. Doyle, 258 U. S. 529 74
Slaughter-House Cases, 16 Wall. 36 131
Smith v. Alabama, 124 U. S. 465 ..... 50, 60
Taft v. Bowers, 278 U. S. 470 83
Towne v. Eisner, 245 U. S. 418 80
United States v. Cerecedo Hermanos, 209 U. S. 338 65
United States v. Crosby, 7 Cranch. 115 47
United States v. Delaware & Hudson Co., 213 U. S. 366 90
United States v. G. Falk and brother, 204 U. S. 143 66
United States v. Farrar, ... U. S. .... (1930) 65
United States v. Field, 255 U. S. 257 74
United States v. Jin Fuey Moy, 241 U. S. 394 90
United States v. Johnston, 124 U. S. 236 65
United States v. Merriam, 263 U. S. 179 74
United States v. Midwest Oil Co., 236 U. S. 459 65
United States v. Robbins, 269 U. S. 315 ..... 13, 14, 17, 56, 64, 67, 68, 70, 71, 72, 73, 92, 97, 153, 154, 156
United States v. Standard Brewery, 251 U. S. 210 90
United States v. Sweet, 189 U. S. 471 65
Warburton v. White, 176 U. S. 484 ..... 22, 27, 43, 44, 47, 68, 93, 117, 128, 137
Washington v. Miller, 235 U. S. 422 47

CASES FROM OTHER FEDERAL COURTS

Page

Bacon v. Hopkins, 27 Fed. (2) 140 46
Bek v. Miller, 8 Fed. (2) 797 45
Bender v. Pfaff, 38 Fed. (2) 649 ..... 46, 62
Hopkins v. Bacon, 38 Fed. (2) 651 ..... 46, 62
Koch v. Goodell, District Court Arizona (not reported) 46, 62
Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199, affrmed 201 Fed. 918 73
Rucker v. Blair, 32 Fed. (2) 222 ..... 1, 45
Scott v. Western Pac. R. Co., 246 Fed. 545 74
Seaborn v. Poe, 32 Fed. (2) 916 1
Smietanka v. First Tr. & Sav. Bank, 268 Fed. 230, affirmed 257 U. S. 602 ..... 74, 75
United States v. Coulby, 251 Fed. 982, 258 Fed. 27 74

CASES FROM U. S. B. TAX APPEALS

Appeal of Bellingrath, 3 U. S. B. Tax Appeals 11 129
Kahn v. Commissioner, 14 U. S. B. Tax Appeals 125 129
Phelps v. Commissioner, 13 U. S. B. Tax Appeals 1248 129
Sunlin v. Commissioner, 6 U. S. B. Tax Appeals 1232 129

CASES FROM WASHINGTON SUPREME COURT

Abbott v. Wetherby, 6 Wash. 507 ..... 38, 138
Adams v. Black, 6 Wash. 528 ..... 22, 137
Ahern v. Ahern, 31 Wash. 334 35
Allen v. Chambers, 18 Wash. 341 ..... 25, 69
Ambrose v. Moore, 46 Wash. 463 ..... 27, 112, 117
Barkley v. American Sav. Bk., 61 Wash. 415 112
Bellingham Motors Corp. v. Lindberg, 126 Wash. 684 115
Bice v. Brown, 98 Wash. 416 28
Board of Trade v. Hayden, 4 Wash. 263 130
Bortle v. Osborne (unofficially reported in 285 Pac. Rep. 425) 19, 30, 99, 107, 108, 120, 136
Brotton v. Langert, 1 Wash. 73 ..... 28, 69
Coles v. McNamara, 131 Wash. 691 ..... 28, 32, 69, 86, 100
Curry v. Wilson, 57 Wash. 509 50
Dane v. Daniel, 23 Wash. 379 ..... 33, 34, 142, 143
Daniel v. Daniel, 106 Wash. 659 111

CASES FROM WASHINGTON SUPREME COURT (Continued)

Page

Day v. Henry, 81 Wash. 61 ..... 28, 69
Fidelity & Deposit Co. v. Clark, 144 Wash. 520 ..... 26, 28
Fielding v. Ketler, 86 Wash. 194 25
Fields v. Fields, 2 Wash. 441 40
Finn's Estate, Re, 106 Wash. 137 110
Floding v. Denholm, 40 Wash. 463 114
Hector v. Hector, 51 Wash. 434 69
Hill v. Young, 7 Wash. 33 ..... 22, 35, 137
Holyoke v. Jackson, 3 Wash. Ter. 235 ..... 22, 30, 68, 137
Hoover v. Chambers, 3 Wash. Ter. 26 ..... 22, 137
Hynes v. Colman Dock Co., 108 Wash. 642 ..... 39, 40, 113
Huyvaerts v. Roedtz, 105 Wash. 657 ..... 29, 32
Itkin v. Jeffery, 126 Wash. 47 ..... 22, 137
Jones v. Duke, 151 Wash. 108 38
Kaufman v. Perkins, 114 Wash. 40 ..... 22, 68, 137
Kies v. Wilkinson, 114 Wash. 89 28
Kimble v. Kimble, 17 Wash. 75 ..... 40, 69, 120
Littell Mfg. Co. v. Miller, 3 Wash. 480 ..... 29, 69
McDonough v. Craig, 10 Wash. 239 ..... 25, 69
Mabie v. Whittaker, 10 Wash. 656 ..... 22, 26, 35, 43, 55, 68, 137
Marsh v. Fisher, 69 Wash. 570 ..... 38, 138
Marston v. Rue, 92 Wash. 129 ..... 24, 40, 41, 55, 68, 113, 114, 123, 130, 136
Mattinson v. Mattinson, 128 Wash. 328 ..... 41, 107, 110
Normille v. Denison, 109 Wash. 205 ..... 41, 111
Olive Co. v. Meek, 103 Wash. 467 ..... 24, 29, 32, 68, 69, 113, 136
Ostheller v. Spokane & Inland Empire R. R. Co., 107 Wash. 678 109
Parker v. Parker, 121 Wash. 24 ..... 28, 35, 68, 114
Peterson v. Zimmerman, 142 Wash. 385 ..... 28, 29, 32, 69
Schneider v. Biberger, 76 Wash. 504 28
Schramm v. Steele, 97 Wash. 309 ..... 22, 28, 40, 55, 68, 136
Scott v. Stanley, 149 Wash. 29 35
Snyder v. Stringer, 116 Wash. 131 ..... 24, 26, 29, 32, 35, 69
Spinning v. Allen, 10 Wash. 570 ..... 26, 40
Spokane State Bank v. Tilton, 132 Wash. 641 ..... 29, 32
Spreitzer v. Miller, 98 Wash. 601 ..... 22, 136
State ex rel Lloyd v. Superior Court, 55 Wash. 347 ..... 69, 120

CASES FROM WASHINGTON SUPREME COURT (Continued)

Page

Stewart v. Bank of Endicott, 82 Wash. 106 ..... 25, 29, 35, 55, 68, 113, 115, 136
Wampler v. Beinert, 125 Wash. 494 ..... 39, 41, 42, 113, 114
Wamsley v. Rostad, 150 Wash. 192 38
Wilson v. Stone, 90 Wash. 365 28

CASES FROM OTHER STATES

Dority v. Dority, 96 Texas 215 ..... 42, 114
Hall v. Johns, 17 Idaho 224 ..... 42, 114
Kohny v. Dunbar, 21 Idaho 258 36

CONSTITUTION OF THE UNITED STATES

Art. I, Third Clause of Sec. 2 76
First Clause of Sec. 8 76
Fourth Clause of Sec. 9 76
5th Amendment 76
14th Amendment, Sec. 1 ..... 50, 131, 145
16th Amendment 76, 77, 79, 82, 84, 85, 89, 103, 106, 122, 128, 132, 145

FEDERAL STATUTES

Judicial Code, Sec. 239, as amended 2
U. S. Code, Title 28, Sec. 346 2
38 St. L. 114 (1913), first Income Tax Law under 16th Amendment 51, 145, 146
39 St. L. 756 (1916), second Income Tax Law 146
40 St. L. 300, War Revenue Act of 1917 146
40 St. L. 1057, Revenue Act of 1918 ..... 56, 67, 147
42 St. L. 227, Revenue Act of 1921 ..... 63, 83, 91, 151
Proceedings in Congress relating to Revenue Act of 1921 150
43 St. L. 253, Revenue Act of 1924 ..... 63, 82, 91, 152, 153
Proceedings in Congress relating to Revenue Act of 1924 ..... 151, 152
44 St. L. 9, Revenue Act of 1926 ..... 8, 51, 53, 76, 153
Sec. 2 (a) 8
210 16
210 (a) 7, 8, 52, 86
211 16
211 (a) 8, 52

FEDERAL STATUTES (Continued)

Page

44 St. L. 9, Revenue Act of 1926 (Continued)
Sec. 212 (a) 8, 15, 16, 89
213 9
213 (a) 15, 16, 86, 89
216 9
216 (c) 9, 53
218 (a) 57
219 (2) 54
219 (a, b, c, d, e, f, g, h) 54
223 ..... 17, 52, 97
223 (a) 9, 10, 52, 54
223 (b) 9, 10, 52, 54
225 54
230 54
231 54
232 54
233 54
45 St. L. 795, Revenue Act of 1928 155
Joint Resolution of Congress, December 16, 1929, reducing rates of income tax 155

STATUTES OF THE STATE OF WASHINGTON

Remington's Compiled Statutes of Washington, 1922:
Sec. 1342 ..... 10, 34, 70, 94, 109, 143
Sec. 6890 ..... 10, 21, 33, 135
Sec. 6891 ..... 10, 21, 33, 135
Sec. 6892 ..... 10, 21, 22, 32, 33, 85, 135
Sec. 6893 ..... 10, 21, 93, 136
Sec. 6894 ..... 10, 137
Sec. 6895 ..... 10, 138
Sec. 6896 ..... 10, 138
Sec. 6897 ..... 10, 138
Sec. 6898 ..... 10, 33, 117, 138
Sec. 6900 ..... 10, 139
Sec. 6901 ..... 10, 139
Sec. 6902 ..... 10, 139
Sec. 6903 ..... 10, 139
Sec. 6904 ..... 10, 139
Sec. 6906 ..... 10, 69, 140
Sec. 7598 ..... 10, 32, 85, 138

STATUTES OF THE STATE OF WASHINGTON (Continued)

Page

Remington's Comp. Stats. of Washington (Continued)
Sec. 10572 ..... 10, 33, 70, 140
Sec. 10575 ..... 10, 33, 70, 140
Sec. 10577 ..... 10, 33, 141
Sec. 10578 ..... 10, 34, 141
Sec. 10579 ..... 10, 142

OPINIONS OF ATTORNEYS GENERAL

32 Op. Attys. Gen. 298 ..... 62, 91, 147, 148
32 Op. Attys. Gen. 435 ..... 44, 48, 62, 73, 91, 116, 119, 128, 148
34 Op. Attys. Gen. 376 152
34 Op. Attys. Gen. 395 152
35 Op. Attys. Gen. 265 ..... 3, 49, 57, 72, 154

RULINGS AND REGULATIONS OF TREASURY DEPARTMENT AND INTERNAL REVENUE BUREAU

Art. 31, Treasury Regulation 62, under 1921 Revenue Act 149
Commissioner's Office Decision 426, 2 C. B. 198 ..... 62, 147
General Counsel's Memorandum 3421 (C. B. VII—1, p. 106) 129
General Counsel's Memorandum 6351 ..... 46, 49
General Counsel's Memorandum 7773 (August, 1930) 37
Solicitor's Memorandum 5411 (C. B. V—1, p. 271) 129
Treasury Decision 2090 (December 14, 1914) 62, 146
Treasury Decision 2137 (January 30, 1915) 62
Treasury Decision 3071, 3 C. B. 221 ..... 62, 148
Treasury Decision 3138, Internal Revenue Bulletin, June, 1921, p. 238 ..... 63, 149

TEXTBOOKS

31 Corpus Juris, 9 ..... 31, 55
13 Ruling Case Law, 1051, 1055, 1089, 1091, 1092 ..... 59, 60
McKay on Community Property, Secs. 1172, 1183, 1184, 1186 108
Williston Contracts (1920) Sec. 414 96

Supreme Court of the United States

OCTOBER TERM 1930

BURNS POE, Collector of Internal Revenue For the District of Washington,

vs.

H. G. SEABORN,

No. 15

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit and on Certiorari

BRIEF OF H. G. SEABORN (herein called Appellee)

I

THE OPINIONS OF THE COURTS BELOW

The opinion of the trial court in this case is reported in *Seaborn v. Poe,* 32 Fed. (2) 916 (R. 7). There is no opinion by the United States Circuit Court of Appeals, but that court, in certifying the questions of law as hereinafter stated, included therein a "Statement of Case," printed on pages 1 and 2 of the Certificate. The Certificate refers to the opinion of that court in a parallel case. *Rucker v. Blair,* 32 Fed. (2) 222 (Cert. 2).

References to the printed Record and Certificate. The letter "R," wherever used in this brief, means the printed "Transcript of Record" filed herein May 26, 1930. "Cert." means the printed Certificate of the Circuit Court of Appeals filed herein November 26, 1929.

Italics, wherever used in this brief, are our own unless otherwise stated.

For convenience of expression we refer in this brief to Collector Poe as "Appellant" and to Seaborn as "Appellee."

II
JURISDICTION

The Circuit Court of Appeals, on November 18, 1929, certified to this court two questions of law (Cert. 1-3) as follows:

> "First. May a husband and wife domiciled in the State of Washington make separate returns of community income, each reporting one-half thereof, and pay taxes on such returns, in accordance with the practice which has prevailed in that State for the past eight years under the rulings and sanction of the Attorney General, the Secretary of the Treasury and other taxing officers of the Government? Or, putting the question in another form—
>
> "Second. Must the husband make return and pay the tax on the entire community income of the husband and wife in that State, as suggested, if not decided by the Supreme Court in *United States v. Robbins*, 269 U. S. 315?"

On May 26, 1930, pursuant to a joint motion of the parties for a writ of certiorari, this court ordered the entire record and cause to be sent up for its consideration. The certified copy of the transcript of record was filed herein May 19, 1930. The whole matter in controversy is consequently now before this Court, pursuant to Judicial Code, Sec. 239, as amended (United States Code, Title 28, Sec. 346).

III

STATEMENT OF THE CASE

This is the test case for the State of Washington with respect to the federal taxation of community incomes, brought pursuant to the arrangement recommended in the opinion of Acting Attorney General Mitchell rendered July 16, 1927 (35 Op. Attys. Gen. 265) (Cert. 1).

After Seaborn and his wife, Charlotte A. Seaborn, had made returns and paid their income taxes, on the basis of dividing between them the community income for 1927, appellant Poe, Collector of Internal Revenue for the District of Washington, for the purpose of making a test case, levied an additional income tax assessment upon plaintiff, H. G. Seaborn, the husband, assessing to him the entire community income of the husband and wife for the year 1927. Plaintiff, having paid the additional tax under protest, sues the Collector in this action to recover the excess amount so levied and so paid (R. 22).

The Seaborns were married December 11, 1902, being then and thereafter citizens and residents of the State of Washington, and having ever since said date continuously maintained the marriage relation. The income herein concerned is wholly community income under the laws of the State of Washington. It chances to be one of the circumstances of this case that neither the plaintiff nor his wife has any separate property or income, as neither had any property at the date of their marriage and neither has since acquired any property by gift, devise, descent or inheritance (R. 20).

Plaintiff and his said wife, during and prior to the year 1927, accumulated a considerable amount of property in the State of Washington, consisting of real estate situated in the State of Washington, and of stocks, bonds, moneys and other personal property, all of the property so accumulated being the community property of the

plaintiff and his said wife under the laws of the State of Washington (R. 20, sub-paragraph G).

In the year 1927, plaintiff was an officer and employee of the Skinner & Eddy Corporation, a Washington corporation, and devoted the major portion of his time to the affairs of that corporation. The salary for the services so rendered in that year was $15,000.00 (R. 21). In addition to the salary, the following income, revenue and profit accrued from the community property aforesaid during the year 1927, namely (R. 21):

Interest on bank deposits, notes and corporation bonds	$12,881.06
Dividends on stock of domestic corporations	8,834.57
Aggregate net profit from the sale of real estate, stocks and bonds	606.59
Profit on sale of boat, "Sea Gypsy" (R. 21)	500.00
Profit on Cities Service joint venture (R. 21)	625.95

The net sum of the above mentioned items (salary and other transactions) to-wit: $38,448.17, constitutes all of the income received by the plaintiff and/or his wife in the year 1927 (R. 2, 7, 21).

It is important to note that a restatement of the items of the foregoing income, showing the same in the three classes of (1) "Income from real estate," (2) "Salary or Wages," and (3) "Income from personal property," results as follows:

Profits from sale of real estate (Lake Washington shore land)	$ 7,000.92
Salary of appellee for the year 1927, as an employe of a corporation	15,000.00
Miscellaneous interest, dividends, and gains (over losses) from personal property	16,447.25
TOTAL	$38,448.17

The item of $7000.92, profit on sale of real estate, is not shown in the schedule at R. 21, par. H, but appears as the first item in the detailed Schedule C at R. 27.

There were miscellaneous gains and losses on the sale of personal property (stocks and bonds), the losses largely exceeding the gains. When the gain of $7000.92 on real estate was consolidated with the profits and losses on stocks and bonds (mostly losses), the net result on both realty and personalty was a small profit of only $606.59, listed as "Profit from sale of real estate, stocks and bonds," as shown in Line 4, par. H, R. 21 Nevertheless, the $7000.92 profit on real estate is necessarily figured in at its full amount in arriving at the total income of $38,448.17 for the year 1927.

There was paid from the community funds for the year 1927 the following sums which constitute allowable and proper deductions from gross income under the Revenue Act of 1926:

Interest paid	$ 9,097.51
Taxes paid	782.26
Charitable contributions	1,716.68
Earnest money forfeited	250.00
Bad debt allowance	325.00
Total allowable deductions	$12,171.45

(R. 2, 21, 26).

All of the income in question for the year 1927, except the salary received from Skinner & Eddy Corporation, was derived during the year 1927 from the said accumulated property mentioned in sub-paragraph "G" (R. 20-21 at end of sub-paragraph G) all of which was their accumulated community property. None of the income, and none of the property from which it was derived, was the separate property of either spouse (R. 21, sub-paragraph H).

Seaborn and his wife Charlotte each filed with the defendant tax collector, within the time required by law, income tax returns for the year 1927. Their returns were made on Form 1040 furnished to taxpayers by the Bureau of Internal Revenue. Copies of the returns filed

by the husband and by the wife are part of the record, marked rsepectively Exhibits "A" and "B" (R. 21, sub-paragraph J). For the returns, see exhibits (R. 25-31).

The return made by plaintiff Seaborn, and that made by his wife, Charlotte, were made on the community property basis, being the same basis on which their returns had been made in previous years. In each of these separate returns, there was included under proper headings, one-half of the income above described, from which there was subtracted one-half of the deductions above itemized, leaving on each return a balance of $13,138.36 as the respective net income of the individual before deducting personal exemptions and earned income credit. The two spouses divided between them the aggregate exemption of $3,500.00 (R. 22, sub-paragraph J).

The tax liability of plaintiff Seaborn upon the income so reported by him was $152.38, which plaintiff paid in full at the time required by law; and the tax liability of Charlotte A. Seaborn upon the income so reported by her was the sum of $168.32, which said wife paid to the defendant collector at the time required by law (R. 21-22).

All of said income so reported by the plaintiff and his said wife Charlotte for the year 1927 was their community income under the laws of the State of Washington. This fact was not only stipulated in writing (R. 34, Par. J), but was also expressly found by the court (R. 21, 22, Par. J). If the plaintiff and his wife were entitled to divide said income, less deductions, exemptions and credits as described, plaintiff's return was correct and the tax liability of plaintiff thereof was as stated in his return (R. 22, sub-paragraph J). The additional tax assessed against plaintiff was $703.01, plus interest in the sum of $17.92, or a total of $720.93 (R. 22, sub-paragraph K).

Plaintiff paid to the appellant collector the additional assessment demanded of him, making at the time of payment proper protest in writing (R. 22, sub-paragraph L)

Plaintiff has complied with all the conditions precedent and all the formal requirements of the statutes and rules relating to his right to institute and prosecute this suit upon the grounds alleged in the pleadings (being the points urged in this brief), and all informalities (if any) have been waived (R. 23, sub-paragraph N).

The District Court also made findings showing the attempts made to have Congress incorporate in the Revenue Acts of 1921 and 1924 provisions which would have overruled the Departmental Rulings establishing the present practice of divided returns (provisions which would have made the law read in accordance with appellants' present contentions) and showing the refusal of Congress to incorporate said proposed provisions (R. 23, 24).

The Trial Court's Conclusions of Law

The Court made conclusions of law as follows (R. 24, 25):

(1) That the income referred to in the foregoing findings of fact, being community income of the plaintiff and of his wife, Charlotte A. Seaborn, was the income of both of said spouses, each spouse having, under the laws of the State of Washington, an equal vested title and interest of one-half of said income, and (2) that said plaintiff and his said wife, Charlotte A. Seaborn, is and was each an individual within the meaning of section 210 (a) of the revenue act of February 26, 1926 (Part 2, 44 S. L., page 21), and (3) that the income tax assessable and payable thereon, under the provisions of the revenue laws of the United States in force during the year 1927 imposed a tax upon plaintiff, H. G. Seaborn, as to only one-half of said community income and imposed a tax upon plaintiff's said wife, Charlotte A. Seaborn, upon the other one-half of said community income, and (4) that the assessment, imposition, and collection of an additional income tax for said year 1927 upon and from said plaintiff, and

which has been paid by plaintiff under protest as alleged in the complaint herein and as found by the court, was not authorized by law and was and is in excess of the requirements of law, and (5) plaintiff is entitled to recover the same from defendant.

IV

STATUTES INVOLVED

A.—FEDERAL STATUTES.

The following portions of the Revenue Act of 1926 are applicable:

Title I. General Definitions

Section 2 (a). When used in this Act—(1) the term "person" means individual, a trust or estate, a partnership or corporation. * * * * * * * * (9) the term "taxpayer" means any person subject to a tax imposed by this Act.

Part II. Individuals

Normal Tax

Section 210 (a). In lieu of the tax imposed by Section 210 of the Revenue Act of 1924, there shall be levied, collected and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum, etc. * * * * *.

Surtax

Section 211 (a). In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows. * * * * *.

Net Income of Individuals Defined

Section 212 (a). In the case of an individual the term

"net income" means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206. * * * *

Gross Income Defined

Section 213. For the purpose of this title, except as otherwise provided in Section 233—(a) the term "gross income" includes gains, profits, and income derived from salaries, wages or compensation for personal services (* * * * *) of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rents, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever * * * * *.

Credits Allowed Individuals

Section 216. For the purpose of the normal tax only, there shall be allowed the following credits: * * * * (c) * * * * or in the case of the head of a family or a married person living with husband or wife, a personal exemption of $3500.00. A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $3500.00. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.

Individual Returns

Section 223 (a). The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this Title. * * *

(2) Every individual having a net income for the taxable year of $3500.00, or over, if married and living with husband or wife; * * * (b) If a husband and wife living together have an aggregate net income for the tax-

able year of $3500.00 or over, or an aggregate gross income for such year of $5000.00 or over (1) each shall make such a return, or (2) the income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate net income.

B.—STATUTES OF THE STATE OF WASHINGTON INVOLVED.

The statutes of the State of Washington involved are those fixing the property rights of husband and wife in that state, and the effect of the marriage relation with respect to property. These statutes, enacted many years ago, are now found in Vol. 2 of Remington's Compiled Statutes of Washington, 1922, and are embraced within twenty-two sections of those statutes. These twenty-two sections are fully set forth in Appendix A of this brief at pp. 135 to 141, namely, Sections 6890, 6891, 6892, 6893, 6894, 6895, 6896, 7598, 6897, 6898, 6900, 6901, 6902, 6903, 6904, 6906, 10572, 10575, 10577, 10578, 10579 and 1342.

V

CONTENTIONS OF THE APPELLEE

In support of the judgment below, the appellee contends:

(1) That, all of the income herein involved being community property of plaintiff and his wife under the laws of the State of Washington, said income belonged to both plaintiff and his wife, the interest of each spouse being an actual and vested one-half interest therein.

(2) That Congress, in the Revenue Act of 1926, Secs. 223 (a) and 223 (b), intended to, and did, grant to husbands and wives in Washington the right to file separate income tax returns and to report therein, one-half each,

the income received by them, which was community property under the Washington law.

(3) A construction of the Revenue Act of 1926 which would require appellee to pay taxes or surtaxes at progressive rates by adding together and assessing to appellee the entire community income (appellee's share plus the share of his wife) would be unconstitutional.

VI

SUMMARY OF ARGUMENT

The community property system of Washington vests equally in the husband and wife the ownership and enjoyment of all community property, real and personal. Neither the accumulated real or personal property nor the income thereof, nor the salary or wages of the husband, can be taken or used for payment of the husband's separate obligations or for his personal torts. Pages 21-32.

This equal and vested ownership of the wife is evidenced not only by specific statutory provisions in the pertinent statutes, but is also shown by numerous expressions appearing in many other sections of the statutes bearing on the subject. The Washington statutes relating to the making of wills and descent of property expressly declare that each spouse owns one-half of the community property, real and personal, and provide for its disposition by will or by inheritance, accordingly. Pages 33-34.

This state of title is further recognized by the fact that, on the death of one spouse, the survivor's title and interest in his or her one-half of the community property is a mere continuation of a title already existing, and there is no change of title by inheritance or descent as to such one-half. The federal authorities recognize this con-

tinuous title by declining to assess a federal estate tax on the half interest held by the surviving spouse. Pages 34-38.

The community property in Washington consists of (a) earnings of the husband, (b) earnings of the wife, (c) recovery for personal injuries suffered by either husband or wife, and (d) the accumulations of husband and wife after marriage, with the rents, issues and profits thereof. The statutes and decisions of Washington afford the wife ample remedies for any interference with her community rights, and the vested and equal interest of the wife in community property is recognized not only by the state decisions, but also by the federal decisions and rulings. Pages 38-47.

It is a fundamental holding of this court that it will follow the state decisions interpreting state laws governing property and property rights; also that the whole subject of domestic relations of husband and wife belongs to the state and not to the United States. Pages 47-50.

There is no common law of the United States. Each state decides for itself its own common law, subject to such alteration as may be provided by its own statutes. The Washington statute (sec. 6898) expressly repeals all common law rules not in harmony with the community property law. Pages 50-51.

Husbands and wives as individuals are authorized and permitted by the express terms of the Revenue Act of 1926 to make separate returns, and to include in such returns, as the income of each spouse, their respective shares of the common income. Pages 51-53.

The association of husband and wife in the marriage relation does not come within the meaning or classification of trusts, corporations, joint stock companies or associations, as described by the Revenue Act of 1926. The only provisions of that act applicable to community in-

comes are those relating to individuals, or, possibly, partnerships. Pages 53-58.

Since Congress has no power to legislate as to domestic relations (such questions being exclusively within the power of the states), the only way to give effect to the language of the Revenue Act levying taxes "upon the net income *of* every individual" is to accept the state's laws and decisions as final on the question of ownership. Pages 58-61.

Whether or not Congress, in imposing income taxes, could constitutionally depart from the state law governing ownership, it has not attempted to do so in the Revenue Act of 1926, or in any other income tax law. Pages 58-61.

A review of the legislative and departmental record, relating to the several revenue acts and the attempts made to change the language thereof, shows a constant executive interpretation in favor of separate and divided returns by husbands and wives in community property states, and the refusal of Congress to change the language of the revenue acts so as to conform to appellant's present contention. Pages 61-64; also Appendix B, 143-156.

If the language of the revenue acts be considered as doubtful, the uniform executive construction and administrative practice (continued for the past ten years and still adhered to) will be given great weight, if not controlling weight, by the courts. Pages 64-67.

Re-enactment of the revenue act in the language which had previously received a uniform executive construction amounts to an adoption by Congress of that construction. That is to say, in the present case there was an express recognition by Congress of the propriety of the existing practice of divided returns by the husband and wife as to community property. Pages 64-67.

So far as concerns the *Robbins* case, 269 U. S. 315, the fundamental differences between the community property

system prevailing in the State of Washington and that prevailing in California require the holding that the opinion in the *Robbins* case is not here applicable. Pages 67-71.

Further, the decision in the *Robbins* case was in accordance with the departmental rulings then prevailing, which (as the opinion in that case shows) refused to California taxpayers the right of making divided returns by husbands and wives, which right the Department recognized as existing in Washington and other community property states. Naturally, therefore, the long continued executive construction as to the meaning of the revenue acts, in the case of the other seven community property states, could not have been considered by the Court as leading to the application of the ruling of the *Robbins* case to those other states. Nor could the Court have considered the effect, as to husbands and wives in other states, of the refusal of Congress to embody in the later revenue acts (after 1918) the change of language which would change the rule and practice then prevailing in those other states and to incorporate in the law the statutory construction now urged by appellant. Pages 71-73.

Revenue statutes are not to be construed so as to enlarge their scope. In case of doubt with respect to the imposition of a tax, the doubt is to be resolved against the Government and in favor of the taxpayer. Pages 73-74.

Even if it could be held that Congress has the power to impose on the husband an income tax and surtax on the income accruing to the husband and wife under the community property system of Washington, such tax would not be imposed until Congress should affirmatively legislate to that effect. Page 75.

To construe the Revenue Act of 1926 in accordance with appellant's contention would render that Act unconstitutional so far as concerns the parts of the Act now

under consideration. It is the duty of the Court so to construe the Act as to preserve its constitutionality. Pages 76-90.

Under the decision in *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, and subsequent cases, an income tax levied upon the income and gains of real estate and invested personal property is a direct tax upon the property producing such income, and the imposition of such a tax must follow ownership. This rule is not changed by the adoption of the Sixteenth Amendment, which merely dispenses with apportionment among the states. The real and personal property being, under the local state law, the property of both husband and wife, it would be unconstitutional to impose such direct tax upon only one of the owners, the husband, and to tax and surtax him accordingly. Pages 79-89.

In this case, the total income for the year 1927 was $38,448.17 (R. 21). This was the total income of both husband and wife. It was made up as follows:

Profits from sale of real estate	$ 7,000.92
Salary of appellee for the year 1927, as an employe of a corporation	15,000.00
Miscellaneous interest dividends and gains from personal property	16,447.25
TOTAL	$38,448.17

Note: The $7,000.92, profit on sale of real estate, does not appear at R. 21, but appears in the detailed Schedule C, (R. 27).

All of the income, except the $15,000.00 salary, was derived during the year 1927 as the annual product of the accumulated real and personal property which was the community property of appellee and his wife (R. 20, 21). So far as concerns the $15,000.00 of salary, the Revenue Act of 1926, Sec. 212 (a) and 213 (a) groups under one general head of "Gross income" and "Net income" all kinds of interest, dividends, gains, profits, salaries

and wages. Secs. 210 and 211 levy the income tax "upon the net income *of* every individual" as defined by Secs. 212 (a) and 213 (a). There is no ground for differentiating, in the interpretation of these statutes, between rents and gains of accumulated property, and salaries and wages, all thereof being taxed by the same formula as the net income of the individual. As to the income from accumulated property, the Constitution requires ownership to be the basis of the income tax, and whatever Congress might have done as to salaries, it has classified salaries with other income in the Revenue Act of 1926, thus making ownership the basis of the tax in all cases. Pages 85-89.

If Congress could have taxed salaries by some general excise law* applicable uniformly throughout the United States, it has not done so by the Revenue Act of 1926, but has placed salaries on the same basis as interest, dividends and property gains, taxing them by ownership. Pages 86-89.

It is further shown that, to require appellee to pay a tax based in whole or in part on the income of his wife (as defined by state law) would violate the following constitutional provisions: (a) that requiring that direct taxes shall be apportioned among the several states unless based on ownership as permitted by the Sixteenth Amendment; (b) that requiring all duties, imposts and excises to be uniform throughout the United States; (c) the Sixteenth Amendment empowering Congress to levy and collect taxes on incomes, as that Amendment has been construed in *Eisner v. Macomber,* 252 U. S. 189; *Bromley v. McCaughn,* 280 U. S. 124, and other cases; and (d) the provision of the Fifth Amendment providing that no persons shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation, in that the proposed tax would be arbitrary and capricious against appellee, in taxing and surtaxing him on an income of which he is not sole owner. Pages 76-89.

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* on some other basis than ownership.

It is the duty of the Court to construe acts of Congress in such a way as to avoid grave doubt of their constitutionality, and serious constitutional questions would have to be determined before the Court could accept the construction of the Revenue Act of 1926 now proposed by appellant. Pages 89-90.

In answer to the several contentions of appellant's brief, it is shown that the husband has no such control over, or right of enjoyment of, the community property that would justify calling him the owner thereof. Pages 91-92.

It is shown that there is no basis for appellant's contention that the *Robbins* case, and *Corliss v. Bowers,* 281 U. S. 376, and *Lucas v. Earl,* 281 U. S. 111, support the view that management and control, rather than ownership, are contemplated by the Revenue Act of 1926 as the basis of taxation. It is shown that appellant's interpretation of Sec. 223 of the Revenue Act, giving the husband and wife the option of filing a joint return or individual returns, would in effect nullify that section. Pages 92-98.

It is shown that appellant's theory as to what constitutes ownership, if accepted as true, would wholly defeat appellant's contention that the husband is the sole owner of the community property and income. It is shown that appellant's contention, that the husband in Washington has actual "command" of the community income, and that such "command" rather than ownership governs the construction of the Revenue Act of 1926, taxing the income *of* every individual, is erroneous in respect to both asserted grounds. Pages 98-99.

Appellant's contention, that permission to divide community income in the State of Washington between husband and wife would be unfair as to taxpayers in states not having the community property system, is erroneous and without foundation. On the contrary, it is shown that, to adopt appellant's contention that community

income in the State of Washington should be taxed and surtaxed wholly to the husband, would be grossly unfair and arbitrary as against husbands and wives in Washington. Such contention would adopt and accept the community property law of Washington to the extent of combining in one fund the community incomes and gains earned or acquired by the husband and wife, working either separately or together (including recoveries for personal injuries to either), and then would tax and surtax the entire joint fund to the husband alone. The same wrongful result would arise from taxing and surtaxing to the husband alone the annual interest, rents and gains arising from the property jointly accumulated by the spouses during marriage. Pages 102-106.

Appellant's contention would not result in separate taxation of the income of the husband and the income of the wife, but would combine them, as required by the Washington law, and then refuse to follow the Washington law as to the ownership of the joint fund. Such result would not only be illogical, but grossly discriminating, arbitrary and capricious. If the state law is to be followed in combining in a common pool what the wife earns and what the husband earns, such law must be followed *in toto,* as to the common ownership. Pages 103-106.

It is shown that the construction of the revenue acts heretofore applied in community property states results in the taxing at the same rate of the income of every individual in each and every state of the Union, taking the local state law as the criterion of what is the income of such individual. To adopt appellant's contention would be to tax a husband in the State of Washington at a much higher rate than the rate applied in the so-called "common law" states, in that it would tax and surtax him upon the aggregate of the joint income of two individuals.

It is shown that the word "entity" as used in some

of the Washington decisions, does not mean that a new juristic being has been created. That entity is like the entity of a partnership; it is a convenient method of referring to two persons viewed with respect to the marshaling of assets, and the separation of joint from several liabilities. This view of the Washington law was distinctly and positively announced by the Washington court in *Bortle v. Osborne* (February 24, 1930) unofficially reported in 285 Pacific Reporter, p. 425, where it is declared that community property is actually owned by the two spouses in equal proportions. Pages 106-108.

It is shown that the further contentions set forth in appellant's brief, regarding the extent of the management and control of the husband of community property in Washington, are not supported by the Washington authorities. Pages 109-112.

It is shown that, under the Washington decisions, the courts have never refused to the wife ample remedies to protect any injury to her share of the community property, in the case of abandonment, dissipation or waste on the part of the husband, or his failure to exercise honest judgment in the management of the community personal property, and that, as to real estate, the wife's powers of management and control are practically equal to those of the husband. Pages 112-124.

Appellant's contention regarding alleged "command" or "dominion" of husband over community property are groundless. Distinction between manager and owner. Brief, 118-124.

It is shown that the experience of the past ten years, in carrying out the present practice of divided returns by husband and wife in Washington, has led to no difficulties whatever, and that there is no practical reason why the present practice should not be continued. Pages 125-126.

It is shown that partnerships between husbands and

wives, lawful under the laws of any state, are specifically recognized by the rulings of the Treasury Department. In all so-called "common law" states, incomes of partnerships consisting of husband and wife are divided between them and each pays the Federal income tax on his and her individual share. The fact that the husband is managing partner, or controls the partnership, is not treated as material. In the case of such partnerships, regardless of the wife's inaction and the husband's management, it is ownership that the Department applies as the sole test of the right of division of income between husband and wife. Brief 129-130.

In Washington a husband and wife cannot become partners in any partnership other than the statutory quasi-partnership of the community system.

It is shown that appellant's argument regarding the intent of Congress to create a so-called "national system" is erroneous in inferring any intent to infringe state laws defining ownership. Brief 126, 127.

It is shown that there is a clear line of demarcation between the state and federal powers, with respect to (a) property rights and (b) federal taxation. It is of vital importance that the powers of each sovereignty be upheld without impairment. Pages 131-132.

VII

ARGUMENT

ARGUMENT POINT I—The nature of the community property law of Washington and its binding effect as a matter of state sovereignty.

A.—THE COMMUNITY PROPERTY SYSTEM OF WASHINGTON VESTS EQUALLY IN HUSBAND AND WIFE THE OWNERSHIP AND ENJOYMENT OF ALL COMMUNITY PROPERTY, REAL AND PERSONAL. NEITHER THE ACCUMULATED REAL OR PERSONAL PROPERTY, NOR THE INCOME THEREOF, NOR THE SALARY OR WAGES OF THE HUSBAND NOR ANY OTHER COMMUNITY PROPERTY CAN BE TAKEN OR USED FOR PAYMENT OF THE HUSBAND'S SOLE OBLIGATIONS OR FOR HIS PERSONAL TORTS.

With the exception of property owned by the spouses before marriage and that acquired afterward by gift, bequest, devise or inheritance, and the rents, issues and profits thereof, all property acquired after marriage in any manner whatsoever by either husband or wife or both is community property (Rem. Comp. Stat., Sec. 6890, 6891 and 6892). Page 135.

By Sec. 6892, the husband has the management and control of community personal property and the like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof. As we show below, notwithstanding the generality of this language, the husband's powers are very much restricted by the judicial decisions construing this section.

By Sec. 6893, the husband has the management and control of the community real property, but is forbidden

to sell, convey or encumber it unless the wife join with him in executing and acknowledging the instrument of conveyance or encumbrance.

As to real estate, conveyances and agreements for conveyances made by the husband alone are void, even as against the husband.

Holyoke v. Jackson, 3 Wash. Ter. 235;
Hill v. Young, 7 Wash. 33;
Mabie v. Whittaker, 10 Wash. 656;
Warburton v. White, 176 U. S. 484;
Adams v. Black, 6 Wash. 528;
Kaufman v. Perkins, 114 Wash. 40.

A lease is an encumbrance under Sec. 6893, and a lease or agreement for a lease, executed by the husband alone, is void even though the wife had knowledge of it.

Spreitzer v. Miller, 98 Wash. 601;
Kaufman v. Perkins, 114 Wash. 40;
Hoover v. Chambers 3 Wash. Ter. 26.

In a suit by vendee to reform for mutual mistake a written contract for the conveyance of land, made by both a husband and wife, reformation is refused unless it be shown that the wife as well as the husband personally participated in the mistake.

Itkin v. Jeffery, 126 Wash. 47.

Referring to Sec. 6892, giving the husband the management and control of community personal property, the language of this section is construed by judicial decisions to amount to no more than the giving of a power of attorney to the husband to act in behalf of his principals, the husband and wife, thus giving effect to the language of the statute which makes community property the common property of both spouses.

In *Schramm v. Steele,* 97 Wash. 309, the Washington Court said:

> "The same circumstances, all of them and no others, which make real estate community property make personalty community property. *The two kinds of*

property are impressed with the community character by the same facts and by force of the same words in the same defining statute. All property, whether real or personal, 'property and pecuniary rights' without exception, 'acquired after marriage by either husband or wife, or both' otherwise than 'by gift, bequest, devise or descent,' is community property. Rem. Code, Sec. 5917, by reference to Secs. 5915 and 5916."

Again in the same opinion the court said:

"The provision of the statute entrusting the husband with 'the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof' (Rem. Code, Sec. 5917), must be construed in the light of this dominant fact of ownership. The property referred to is 'community' property, that is, property belonging to the community. The husband is made, by the statute, the manager, not the owner. His management and control include the power of absolute disposition, *but only for the community.* Else there is no such thing as a *vested property right in the community as to any personal property,* since the husband could give away all such property in any manner he pleased, except by will, at any time during the existence of the community. To hold that the whole substance of the term 'community property' as applied to personalty consists in a mere contingent expectancy of the wife, would make the term 'community personal property' a palpable misnomer. It would take away every community element except that the wife's labors and sacrifices had helped to earn it. *It would destroy that equality which it is the obvious purpose of our community property law to conserve.*

"These considerations make it plain that the stat-

ute, in conferring upon the husband the management and control of the community property, though giving him the absolute power of disposition of community personalty, intends no more than to make him the statutory agent of the community. *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111. *The words of the statute are generally no broader than those often employed in general powers of attorney* for the management and disposition of personal property; but we have yet to learn of a case in which such a power, however broad, was held to destroy the estate of the donor of the power and subject the property to the personal debts of the attorney in fact."

In *Olive Co. v. Meek,* 103 Wash. 467, it is said:

"This statute involves community property rights and not the enforcement of individual judgments against the husband for causes without the scope of the husband's agency and management of the community property."

Snyder v. Stringer, 116 Wash. 131.

In *Marston v. Rue,* 92 Wash. 129, the Court said:

"Now a wife's rights in family personalty are not of the contingent sort, like dower or survivorship, *but a present estate.* True, by our statute the husband is made manager with full power to sell and dispose of this. But it does not follow that he can give it away. He is, so to speak, only *the head of a firm. The personal property is just as much hers as his.* The very statute that gives him sale power over the whole restricts his testamentary power to a half. Under our law, she has helped to create it as much as he. Consequently, the idea is not to be tolerated that a husband can give a mistress stocks and bonds or precious stones out of the family money. No part of those savings can be made gifts of against her consent, even to his own relatives, though mere trifles

> to the latter no doubt might be sustained under the rule of *de minimis*. The law cannot countenance his right to a wilful, premeditated waste of family personal property, which is now so often the bulk of an estate."

This case further holds that, under the circumstances shown, the wife had the right to retake the property in question (an automobile) from the husband's mistress and to sell it, adding:

> *"Her property right in it is as great as his."*

In *Stewart v. Bank of Endicott,* 82 Wash. 106, the Court said:

> "As argued by the respondents, the purpose of Sec. 5917 (6892 Rem. Com. Stat.), is to give the management and control of the community personal property to the husband *for the purpose of facilitating the business of the community.* He can neither beggar his family nor use the community personal property to gratify a caprice to thwart the law, or for his own personal agrandizement."

The wife's present interest in community personalty has been further recognized by the Washington courts in approving the practice of making the wife a party defendant in a suit brought on a contractual or tortious liability created by the husband, where it is asserted that he acted as agent of the community. In such a suit the wife has the right to assert the non-community character of the debt or obligation, and if she does so, this question must be litigated at the time that all other controverted questions in the case are litigated.

McDonough v. Craig, 10 Wash. 239;

Allen v. Chambers, 18 Wash. 341.

The wife may borrow money or otherwise incur obligations for the benefit of the community and thereby bind the community as effectually as the husband may do.

Fielding v. Ketler, 86 Wash. 194.

On the other hand, the husband, equally with the wife, is prohibited by Washington statutes from discharging out of community property an obligation which is not a community obligation, and the wife suing alone may enjoin collection of the husband's separate debt out of community property.

Spinning v. Allen, 10 Wash. 570;
Snyder v. Stringer, 116 Wash. 131;
Fidelity & Deposit Co. v. Clark, 144 Wash. 520.

It is the uniform holding of the Supreme Court of Washington that the title to community property, whether real or personal, is equally in both spouses. These decisions deny that the husband holds the *legal title* with an *equity* in the wife, and hold that the *title of both is legal.* On this point, in *Mabie v. Whittaker,* 10 Wash. 656, the Court said:

> "A good many cases have been cited by the respondents holding that a purchaser of the legal title to lands without notice of any equities therein will take the entire title and we presume this will not be disputed as a general proposition, but some of them from California and Texas go further and hold in effect that the wife's interest in community lands is an equitable interest only, and that her heirs would be cut off by such a conveyance. But in both of these states the disposition of community lands rested in the husband and he could convey the same to satisfy the community debts after her death. In some instances, the record title is spoken of as the legal title, but this can be true only in a qualified sense. A deed of lands under the conditions specified in the statute, vested the ownership in the community, no matter which spouse was named as grantee in the deed, *and the title of one spouse therein was a legal title as well as that of the other.*"

The holdings of the Washington court were expressly

affirmed by this court in *Warburton v. White,* 176 U. S. 484, where the Court, speaking of the right of disposition conferred on the husband, and after citing several Washington decisions, said:

> "This right being vested in him, *not because he was the exclusive owner,* but because by law he was created the *agent of the community.* The proceeds of the property when sold by him becoming an acquet of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community."

Again, in *Buchser v. Buchser,* 231 U. S. 157, this Court held that property obtained through the homestead laws of the United States, in the State of Washington, became the community property of the husband and wife, and that the vesting of title with respect to the same was controlled by the laws of the State of Washington, and that as to such vesting of title, the Federal Courts would follow local decisions. Mr. Justice Holmes in that case said:

> "There is no doubt, of course, that until the title is completed, the laws of the United States control * * * but when the title has passed, then the land, 'like all other property in the state, is subject to state legislation.' "

The treatment accorded the interests of the respective spouses, when the community is dissolved otherwise than by death (*e. g.* by divorce) illustrates the equal proprietary interest of the wife in community property.

In *Ambrose v. Moore,* 46 Wash. 463, the Court said:

> "From the necessities of the case, their *joint or community* property must become common property. After the divorce there is no community, and in the nature of things, there can be no community property. The divorce does *not vest or divest title;* the

title does not remain in abeyance and it must vest in the *former owners* of the property as tenants in common."

In *Schneider v. Biberger,* 76 Wash. 504, it is said:

"Such property as was community property prior to the decree and not disposed of thereby, would become common property in which husband and wife would *retain* all the interest *vested in them* prior to the decree."

The community property is not liable for the husband's torts, though committed after marriage, unless under the doctrine of *respondeat superior,* they are committed in carrying on the business of the community. For instance, a husband who holds the office of sheriff, and in that capacity committed a tort, cannot subject the community property to liability therefor.

Fidelity & Deposit Co. v. Clark, 144 Wash. 520;
Brotton v. Langert, 1 Wash. 73;
Bice v. Brown, 98 Wash. 416;
Kies v. Wilkinson, 114 Wash. 89;
Coles v. McNamara, 131 Wash. 691;
Schramm v. Steele, 97 Wash. 309;
Wilson v. Stone, 90 Wash. 365;
Day v. Henry, 81 Wash. 61.

In case the husband during marriage incurs indebtedness by becoming an accommodation endorser or guarantor of indebtedness in which the community has no interest, his liability cannot be enforced against the community property.

Peterson v. Zimmerman, 142 Wash. 385.

In *Parker v. Parker,* 121 Wash. 24, the Court said:

"The law which gives the husband the management and control of the community personal property does not give him the right to make substantial gifts thereof against the consent of his wife. As was said in *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634: 'the

statute * * * intends no more than to make him a *statutory agent* of the community.'

"Not having the consent of his wife—the record, in fact, disclosing that she would not consent thereto—the rule established in *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111, is applicable and the gift must be held to have been void."

See also:

Stewart v. Bank of Endicott, 82 Wash. 106.

The community property is not liable for the separate obligations of either husband or wife, but only for obligations which can be strictly classified as "community debts." Debts contracted by the husband (or by the wife) before marriage cannot be enforced against community property. The same is true of an obligation contracted by the husband after marriage unless the same constitute a community debt by reason of having been contracted *in behalf of the community business* under the husband's limited authority of management and control. Community *personal property* falls within this rule equally with community real etsate, and cannot be used or resorted to for the purpose of paying the husband's separate debt.

Olive Co. v. Meek, 103 Wash. 467;
Peterson v. Zimmerman, 142 Wash. 385;
Spokane State Bank v. Tilton, 132 Wash. 641;
Snyder v. Stringer, 116 Wash. 131;
Huyvaerts v. Roedtz, 105 Wash. 657.

In order that community property in Washington may be taken for a debt contracted by either husband or wife, the debt must be shown to be a debt contracted in behalf of the community, and both husband and wife are individually entitled to their day in court on the determination of this question. A judgment against the husband alone does not settle the point. The wife "has at least as much right to contest the facts" as the husband has.

Littell Mfg. Co. v. Miller, 3 Wash. 480.

The nature of the relationship between husband and wife in their ownership of the community property has been variously described in the decisions of the Supreme Court of Washington. In the early case of *Holyoke v. Jackson,* 3 Wash. Ter. 235, the Court said:

> "It probably approaches more clearly to that kind of partnership called *universal* than to any other business relationship known to the civil or common law * * * Management and disposition may be vested in either one or both of the members. If in one, then *that one is not thereby made the holder of larger proprietary rights than the other,* but is clothed, in addition to his or her proprietary rights, with a *bare power* in trust for the community."

The latest decision of the Supreme Court of Washington on this subject is found in *Bortle v. Osborne,* decided February 24, 1930 (not yet officially reported, but unofficially reported in 285 Pacific Reporter, page 425). In that case, the Court expressly declares that the community is not a distinct entity or juristic person, and that all community property is owned by both spouses equally. The Court laid down the following propositions:

> "(1) We have not receded from the rule, which we now reiterate, that the liability for the husband's tort *which is committed in the management or prosecution of the community business* can be enforced against the community property."

> "(2) By the community property law of this state, Rem. Comp. Stat., Sec. 6890-6906, the legislature *did not create an entity or a juristic person* separate and apart from the spouses composing the marital community. The legislature did nothing more than classify as community property—designate the character of certain property as community and other property as separate—the *property acquired* after marriage *by the spouses.* We have, *for convenience of expression,*

employed the terms 'entity' and 'legal entity' in referring to a partnership and to a marital community. However, we have never held that a partnership or a marital community is a legal person separate and apart from the members composing the partnership or community, or that either the partnership or the marital community has the status of a corporation.

"A marital community is in no sense a corporation; neither is it a partnership, though the community of property between the spouses is, in a restricted sense, a partnership between the husband and wife. The legislature, in defining community property, Sec. 6890-6906, Rem. Comp. Stat., *did not change the relationship of husband and wife* to the status of a corporation or declare that the property acquired during marriage was owned by a legal personality distinct from the spouses composing the community. *In the community property each of the spouses has an undivided one-half interest.*"

The Court then quotes approvingly from 31 C. J., p. 9, where it is said:

"In a restricted sense, the community of property between the husband and wife is a partnership between the husband and wife, but, while in many respects it bears a close analogy to an ordinary partnership, the analogy is not complete, and in no exact sense can it be denominated a partnership."

In the case at bar, all of the income in question (except the salary discussed below) was the product, by way of interest, dividends or profits of community property—of the prior accumulations of Seaborn and his wife, accumulated before the year 1927. Both by statutory definition and by legal effect, the product of this accumulated community property was also community property and is so found by the Court in the present record (R. 20, Par. G). Of the total income, the sum of $7000.92 was profit

on the sale of real estate previously owned (R. 27, Schedule C).

As to the $15,000.00 of salary received from the Skinner & Eddy Corporation, not only was that salary community property of both spouses, by the positive wording of the statute (Sec. 6892) and by the repeated holdings of the Washington Court, but another section of the statute (Sec. 7598) prohibits Seaborn from making any assignment of that salary previous to its actual earning without the written consent of the wife attached to the assignment.

Further, it is important to note that the personal indebtedness of the husband could not have been collected out of that salary, either before or after its payment by the employer. This is the precise holding in *Coles v. McNamara,* 131 Wash. 691, where it was held that the husband's current earnings, being community property, were not subject to garnishment for his separate debts or liabilities. This holding, of course, follows the established rule of the Washington authorities to the effect that the husband's separate indebtedness whether in contract or tort, cannot be enforced against the community property, either real or personal.

Snyder v. Stringer, 116 Wash. 131;
Peterson v. Zimmerman, 142 Wash. 385;
Spokane State Bank v. Tilton, 132 Wash. 641;
Olive Co. v. Meek, 103 Wash. 467;
Huyvaerts v. Roedtz, 105 Wash. 657.

B.—THE EQUAL AND VESTED OWNERSHIP OF THE WIFE IN COMMUNITY PROPERTY IS EVIDENCED NOT ONLY BY THE DIRECT LANGUAGE OF THE STATUTORY SECTIONS ABOVE SPECIALLY CONSIDERED (REM. COMP. STAT., SECS. 6890, 6891 AND 6892) BUT IS ALSO DEMONSTRATED BY NUMEROUS EXPRESSIONS TO THE SAME EFFECT IN OTHER SECTIONS OF THE STATUTE.

Sec. 6898 (Appendix A, p. 138) enacts that

> "The rule of common law, that statutes in derogation thereof are to be strictly construed has no application to this chapter, * * * and its provisions and all proceedings under it shall be liberally construed with a view to effect its object."

Sec. 10572 (Appendix A, p. 140) contains detail provisions whereby a husband may convey to the wife, or a wife may convey to the husband *"his or her community right, title, interest or estate* in all or any portion of their community real property."

Sec. 10575 (Appendix A, p. 140) provides for powers of attorney by the husband or wife "authorizing the sale or other disposition of *his or her community interest or estate* in the community property." The foregoing language is not restricted to community real property, but applies also to personalty. Later language in the same section refers to "the community *estate held by such husband or wife* in any real property."

Sec. 10577 (Appendix A, p. 141) protects a *bona fide* purchaser who buys from the spouse appearing in the public record to hold the legal title, provided he is in fact *bona fide* purchaser. As shown below, this section protects only an actual *bona fide* purchaser, that is, who not only is ignorant of the marriage, but who could not ascertain the existence of the marriage, by reasonable diligence. *Dane v. Daniel,* 23 Wash. 379.

Sec. 10578 enacts that

> "A husband or wife *having an interest in* real estate by virtue of the *marriage relation,* the legal title *of record* to which real estate is or shall be held by the other, may *protect such interest,*"

from sale or disposition by the husband or wife by filing in a public office a certain written notice "describing such real estate *and the claimant's interest therein.*"

In *Dane v. Daniel,* 23 Wash. 379, it is held that no filing of such notice by the wife is required in order to protect her community interest, except as against actual *bona fide* purchasers, and that no purchaser can claim to be *bona fide* unless he shows that he not only did not know of the existence of the marriage *but could not have learned of the marriage by the exercise of reasonable diligence.* In practice, few filings are made by wives under these sections, as they rely upon the notoriety of their marriage, under the rule of *Dane v. Daniel.*

C.—THE WASHINGTON STATUTES RELATING TO THE MAKING OF WILLS AND THE DESCENT OF COMMUNITY PROPERTY EXPRESSLY DECLARE THAT EACH SPOUSE OWNS ONE-HALF OF THE COMMUNITY PROPERTY, REAL AND PERSONAL, AND PROVIDE FOR ITS DISPOSITION BY WILL OR BY INHERITANCE ACCORDINGLY.

Sec. 1342 (Appendix A, p. 143) provides that, upon the death of either husband or wife, one-half of the community property goes to the survivor and the other half is subject to the testamentary disposition of the deceased husband or wife.

> "In case no testamentary disposition shall have been made by the deceased husband or wife *of his or her half of the community property,* it shall descend

equally to the legitimate issue of his, her or their bodies."

This statute has regulated the descent and testamentary disposition of community property in Washington for more than fifty years. The language of this section is also recognized by the courts as showing the actual ownership by the husband and by the wife of their one-half interest in all the community property, real and personal.

Ahern v. Ahern, 31 Wash. 334;
Snyder v. Stringer, 116 Wash. 131;
Scott v. Stanley, 149 Wash. 29;
Hill v. Young, 7 Wash. 33;
Mabie v. Whittaker, 10 Wash. 656;
Stewart v. Bank of Endicott, 82 Wash. 106;
Parker v. Parker, 121 Wash. 24;
Buchser v. Buchser, 231 U. S. 157.

In *Scott v. Stanley,* 149 Wash. 29, it is held that, on the death of the wife intestate, her one-half of the community property vests immediately in her heirs without probate.

Consequently, the husband can do nothing to prevent the wife's willing away her one-half of the community property to strangers or, in the absence of a will, to prevent the descent, on her death, of her half of the community property to her children by the same or by a former marriage.

Suppose that, during the marriage, the husband as agent of the community builds up a substantial business, of great value as a going concern because of its earning power. Upon the wife's death, her legatees or devisees, though strangers, or, in the absence of a will, her children, can immediately insist on a liquidation or sale of the business and all other community assets in order to reduce to cash the wife's one-half of the community busi-

ness and community property which passes to her legatees, devisees or children.

Suppose, on the other hand, under the circumstances last described, the husband dies and the wife survives. The business and assets must be liquidated just the same as in the other case. The wife will continue to own one-half of all the property, and the husband's children or his legatees or devisees will take the one-half interest which belonged to the husband. There is equality of interest and equality of treatment in both cases. These statutory provisions are utterly inconsistent with the claim that the wife's interest in community property is not actual, real and vested.

D.—UPON THE DEATH OF EITHER HUSBAND OR WIFE, THE STATE LAW RECOGNIZES THAT THE TITLE OF THE SURVIVOR TO THE ONE-HALF INTEREST IN THE COMMUNITY PROPERTY IS A MERE CONTINUATION OF A TITLE ALREADY EXISTING, AND THAT THERE IS NO INHERITANCE OR DESCENT AS TO THE HALF HELD BY THE SURVIVOR. THE FEDERAL AUTHORITIES RECOGNIZE THIS CONTINUOUS TITLE BY DECLINING TO ASSESS A FEDERAL ESTATE TAX ON THE HALF INTEREST HELD BY THE SURVIVING SPOUSE.

The inheritance tax laws of the State of Washington have been uniformly interpreted as placing no tax upon the one-half of the community property held by the survivor when husband or wife dies. This proposition is so clear that the point has never been brought before the Washington courts. However, the Inheritance Tax Department of the State of Washington has constantly ruled to that effect. See *Kohny v. Dunbar,* 21 Idaho 258, where reference is made to this established practice under the Washington law.

The same ruling is made by the Federal authorities

with reference to the application of the United States estate tax. The United States have never attempted to levy an estate tax upon the interest of the surviving husband or wife in community property. It has always been conceded by the Federal authorities, and still is conceded, that no Federal estate tax applies in such cases. Obviously, this is for the reason that there is no change of title as to the one-half of the community property held by the surviving husband or wife, but the survivor holds by continuation of an existing title. The rulings of the Treasury Department and Internal Revenue Bureau on this point have been consistent and uniform.

The latest Federal ruling that we have noticed on this point is *General Counsel's Memorandum* No. 7773 (August, 1930). Notwithstanding special circumstances of the case, the General Counsel adheres to the general rule, as above stated, that the interest of the husband or wife in the community property is not subject to the Federal estate tax, saying:

> "In view of the court's decisions in the *Vincent* and *Underwood* cases, which are applicable to the instant case, it is the opinion of this office that the value of B's interest in the community property is not a part of A's gross estate within the purview of Section 302 (a) of the Revenue Act of 1926, notwithstanding the fact that she elected to take under the will."

The *Vincent* and *Underwood* cases cited by the General Counsel are decisions of the United States District Court for the Northern District of Texas. The general principle above stated was enunciated by Departmental rulings long ago. The only question raised in the recent cases was whether a different rule applied where, by reason of testamentary provisions, an election by the wife was required. As to those decisions, the General Counsel says:

> "In each of those cases, the Court held without written opinion that the interest of the wife in the

community estate was not a part of her deceased husband's gross estate. The Government did not appeal from those decisions."

E.—THE COMMUNITY PROPERTY IN WASHINGTON CONSISTS OF (A) THE EARNINGS OF THE HUSBAND, (B) THE EARNINGS OF THE WIFE, (C) RECOVERIES FOR PERSONAL INJURIES SUFFERED BY EITHER HUSBAND OR WIFE, AND (D) THE ACCUMULATIONS OF HUSBAND AND WIFE AFTER MARRIAGE, WITH THE RENTS, ISSUES AND PROFITS THEREOF.

It would be manifestly unfair to follow the state law only to the point of combining these sources of income into a joint income and then taxing the entire fund to the husband alone. No provision of the Revenue Act authorizes such a hybrid and unjust result.

The earnings of the wife are community property equally with the earnings of the husband. It is only when the wife is living separate and apart from the husband that her earnings become her separate property.

Abbott v. Wetherby, 6 Wash. 507, 512;
Marsh v. Fisher, 69 Wash. 570.

Throughout the Washington decisions, there occur cases where the community property is found to be the result of the earnings of the work or labor of the wife. Both the statute and the decisions treat the work and services of the wife as having the same effect as the work and services of the husband, namely, to produce community property.

In *Jones v. Duke,* 151 Wash. 108, it was held that a wife's bank account, accumulated by her savings from allowances for running a house and from money received from a roomer and boarder, is community property.

In *Wamsley v. Rostad,* 150 Wash. 192, 196, it was held that, where an unmarried woman had a contract for com-

pensation for caring for an invalid mother, the woman's marriage converted the subsequent earnings under that arrangement into community property. The Court said:

> "From the date of the marriage, the earnings of the deceased (she at all times up to her death having lived with her husband) belonged to the community, and earnings subsequent to the marriage could not be diverted from the community by the prior contract."

It is, of course, the common practice for married women to earn money as clerks, assistants in various occupations, musicians, teachers and what-not. They are frequently engaged in mercantile and professional occupations, either singly or in combination with their husbands. All earnings and profits so made by a married woman become community property in Washington. It is absurd to say that the community property law of the State is to be followed up to the point of converting these earnings of the wife into community property, and then refusing to give to the state community property statutes their further effect by recognizing the joint and common interests of both spouses in the product.

The same principle applies as to recoveries for personal injuries suffered by either husband or wife. Whatever personal injury the wife undergoes, the compensation therefor is community property.

Hynes v. Colman Dock Co., 108 Wash. 642;
Wampler v. Beinert, 125 Wash. 494.

The community property law of Washington does not require any showing as to whether the community property arises from one or all of the four sources set forth in the foregoing proposition E. The wife's interest in all of the community property arises positively from the state law which makes all thereof the common property of the husband and the wife and protects equally the interest of both spouses therein.

All of the income involved in this case, except the

$15,000 salary, was produced as rents, issues and profits of the prior accumulations of the husband and wife, their common property. How much the personal earnings of the wife and her personal efforts (or her personal injuries) contributed to those accumulations in prior years does not appear in the record and is immaterial. The material fact is the ultimate fact that all of those accumulations were the joint and common property of both spouses.

F.—THE STATUTES AND DECISIONS IN THE STATE OF WASHINGTON AFFORD THE WIFE AMPLE REMEDIES FOR ANY INTERFERENCE WITH HER COMMUNITY RIGHTS.

Given the status of community property, the foregoing proposition naturally follows:

Marston v. Rue, 92 Wash. 129;

Schramm v. Steele, 97 Wash. 309;

Kimble v. Kimble, 17 Wash. 75;

(An action brought by the wife against the husband, wherein the Court set aside a deed executed by the husband, conveying property to his mistress.)

Fields v. Fields, 2 Wash. 441;

(In which a conveyance by the husband to his brother, made without consideration, was set aside.)

Spinning v. Allen, 10 Wash. 570.

(In which the wife, suing alone, was given an injunction against the collection of a separate debt of the husband out of community property.)

In *Hynes v. Colman Dock Co.,* 108 Wash. 642, a wife brought suit against a third party for personal injuries received by her, and made the husband a party defendant. Re-

covery to the wife was refused on the sole ground that the complaint did not allege "*abandonment* or *dissipation,* or *waste* of the community personalty, nor of the *husband's failure to exercise honest judgment* in refusing to institute action." This decision applies the same principle as that announced in *Marston v. Rue,* 92 Wash. 129, and, in fact, holds by necessary implication that the wife alone may maintain an action even as to the community personal property, where she alleges that there has been an abandonment of the cause of action by the husband, or dissipation or waste thereof, or that the husband has failed to exercise honest judgment in the exercise of his statutory powers.

In *Mattinson v. Mattinson,* 128 Wash. 328, a suit by the wife alone against the husband alone was sustained and the wife's claims against the community property upheld.

In *Normile v. Denison,* 109 Wash. 205, the Court, at the suit of the wife, set aside conveyances and transactions whereby the husband had attempted to defraud his wife of community property.

In *Wampler v. Beinert,* 125 Wash. 494 (discussed more at length at p. 113 of this brief), the Court protected the wife's interest in community personal property where the husband had neglected or refused to act in asserting a claim for personal injuries to the wife and had attempted to settle and release the claim therefor. The Court held that the purpose of the statute, giving the husband management and control of the community personal property is only for the purpose of facilitating the business of the community, and that he cannot use that power to *thwart the law.* The Court also held that the doctrine of *respondeat superior* cannot be applied to acts of the husband when such acts are without the scope of his authority, and the Court speaks of the wife's "inherent power" to act when necessary to protect her interest in community

property. Further, in this case (*Wampler v. Beinert,* 125 Wash. 494), the Court adopts the Texas rule as established in *Dority v. Dority,* 96 Texas 215, and other Texas cases, that the wife can protect, and enforce in the courts by suit against the husband, her property rights in community property, and the Washington court quotes from *Dority v. Dority* as follows:

> "—his right of management is dependent upon the discharge of the duties which go hand in hand with that right, * * * if the husband has repudiated the duties, and is asserting only the rights and powers of his position for selfish purposes, the wife has rights of property which she can enforce in the courts * * *."

In the same case (*Wampler v. Beinert,* 125 Wash. 494), the Washington court also approves and follows the holdings of the Idaho Court along similar lines, quoting with approval the following from *Hall v. Johns,* 17 Idaho 224:

> "—the interest of the wife is so vested in her that the husband cannot deprive her of it by voluntary alienation for the mere purpose of divesting her of her claim to it."

No case can be found in the State of Washington where the wife has been refused protection as to community property, either real or personal, where the husband has been guilty of dissipation or waste, or fraud, or has failed to exercise honest judgment in the exercise of his statutory power of attorney, or where, for any reason, the wife's interest needs protection.

In fact, the necessary conclusion from all of the holdings of the Washington courts is that the wife, being the actual holder of the legal title to one-half of the community property, real and personal, can maintain any appropriate action to preserve her rights when in danger. The fact that there are few actions of this kind in the

Washington reports is due to the fact that the wife's rights are thoroughly well known and recognized and do not require litigation to compel respect to them.

G.—THE VESTED AND EQUAL INTEREST OF THE WIFE IN COMMUNITY PROPERTY IN WASHINGTON IS RECOGNIZED NOT ONLY BY THE STATE DECISIONS BUT ALSO BY THE FEDERAL DECISIONS AND RULINGS.

The decision of this court in *Warburton v. White,* 176 U. S. 484, cites and quotes from several of the Washington decisions which we have cited above in this brief, approves those decisions and asserts the wife's positive interest in the community property in Washington. Quoting from the case of *Mabie v. Whittaker,* 10 Wash. 656, this court recognizes that the wife's right is as much vested in community property as is the husband's (p. 493). At p. 494, this court said:

> "Now it cannot in reason be denied that the decisions from which we have just quoted held that the purpose of the legislature of Washington, whether Territorial or State, in the creation of community property, was to adopt the features essentially inhering in what is denominated the community system—that is, that property acquired during marriage, with community funds, became an acquet of the community and *not the sole property of the one in whose name the property was brought,* although, by the law existing at the time, the husband was given the management, control, and power of sale of such property. This right being vested in him, *not because he was the exclusive owner,* but because by law he was created the *agent* of the community."

Further, at p. 497, this court said:

> "It is a misconception of that system to suppose

> that, because power was vested in the husband to dispose of the community acquet during marriage, as if it were his own, therefore by law the community property *belonged solely to the husband.* The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the *common ownership* would attach to the result of the sale of the property."

In *Arnett v. Reade,* 220 U. S. 311, a case involving the nature of the title to community property in New Mexico, this court cites and follows *Warburton v. White.* The opinion of the court declares:

> "It is conceded by the court below and everywhere, we believe, that in one way or another she (the wife) has a remedy for an alienation made in fraud of her by her husband."

and this court expresses the view that the legislature could not put an end to the wife's interest "without compensation consistently with the Constitution of the United States."

As to the several opinions of the Attorneys General of the United States, we discuss those more at length hereafter. At this point, however, it is opportune to quote from the opinion of Attorney General Palmer (February 26, 1921, 32 Op. Attys. Gen. 435). The portion of the opinion referring to the State of Washington quotes the pertinent statutory provisions and concludes:

> "It appears to be the settled law of that state that the wife has, during coverture, as well as upon the dissolution of the marriage, a vested and definite interest and title in community property, equal in all respects to the interest and title of her husband therein. Leading cases are: *Holyoke v. Jackson,* 3 Wash. Ter. 235; *Mabie v. Whittaker,* 10 Wash. 656, 39 Pac. 172; *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111; *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634; *Huyvaerts v. Roedtz,* 105 Wash. 657, 178 Pac. 801."

Similar statements are made by the Attorney General with respect to the community property laws of the other seven states except California, concerning which he says the statutes and decisions of that state require a different holding. He says:

> "Summarizing, it appears that in all of the community property states, except California, their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property. *Her rights in the property of the community are perhaps most fully recognized in the state of Washington,* where both spouses have testamentary disposition over one-half of the community property, and where in the absence of such disposition it descends to their issue, or, in the absence of issue, to the survivor; while the husband is manager of the community estate in Washington, he may not sell, convey or encumber real estate unless the wife join with him in the conveyance; and as was held in *Huyvaerts v. Roedtz, ante,* and *Schramm v. Steele, ante,* the separate debt of the husband cannot be satisfied out of community property where it is not incurred in connection with community business, nor for the benefit of the community."

The same principle has been declared by the Court of Appeals of the District of Columbia.

Bek v. Miller, 8 Fed. (2nd) 797.

In ruling on the precise point involved in the present appeal, namely, the right of the husband and wife in the State of Washington to make separate returns and to pay the income tax accordingly, the Circuit Court of Appeals for the Ninth Circuit, in *Rucker v. Blair,* 32 Fed. (2) 222, speaking of the community property system of Washington, said:

> "The wife has during coverture, as well as upon dissolution of the marriage, a vested and definite

interest and title in community property *equal in all respects* to the interest and title of her husband therein. *Marston v. Rue,* 92 Wash. 129, 159 P. 111; *Schramm v. Steele,* 97 Wash. 309, 166 P. 634; *Huyvaerts v. Roedtz,* 105 Wash. 657, 178 P. 801. See also Op. Atty. Gen., March 3, 1921, TD 3138, 4 CB 238."

The decisions of the United States District and Circuit Court of Appeals, regarding this same question as to taxation of community incomes in Texas, Louisiana and Arizona, are to the same effect.

Bacon v. Hopkins, 27 Fed. (2) 140;
Hopkins v. Bacon, 38 Fed. (2) 651;
Bender v. Pfaff, 38 Fed. (2) 649;
Koch v. Goodell (District Court, Arizona, March, 1929; not reported).

In fact, the broad statement can be made that all courts, state and federal, which have passed upon the question with respect to the federal taxation of community incomes (the status in California only excepted) have uniformly held that the wife is the owner of one-half of the community income and, as such, is taxed in the several Federal Revenue Acts, and is entitled to return thereunder her half. We later call attention to the departmental and legislative history of this question and, when facts in that connection are considered along with the judicial decisions, the situation presented is that all departments of the Government—executive, legislative and judicial—to whom the question has been presented have all concurred in sustaining the present practice of individual returns by husband and wife as to community income.

The General Counsel of the Internal Revenue Bureau, in Memorandum No. 6351, involving the status of certain income in Texas, said:

"It is settled that the Federal courts follow the state courts where they have spoken in regard to the

property rights of their citizens (citing cases). In this manner, the Federal courts apply the state law in determining the owner of the funds regarded as income, and so ascertain the person to whom that income is to be taxed."

H.—IT IS A FUNDAMENTAL HOLDING OF THIS COURT THAT, AS A MATTER OF SETTLED POLICY, IT WILL FOLLOW THE STATE DECISIONS INTERPRETING STATE LAWS GOVERNING PROPERTY AND PROPERTY RIGHTS. ALSO THAT THE WHOLE SUBJECT OF DOMESTIC RELATIONS OF HUSBAND AND WIFE BELONGS TO THE LAWS OF THE STATES AND NOT TO THE LAWS OF THE UNITED STATES.

In *Warburton v. White,* 176 U. S. 484, 496, this rule is enunciated in the following language:

"Where state decisions have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature, in other words, where the state decisions establish a rule of property, this court when called upon to interpret the state law will, if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the state, and thus conform to the rule of property within the state."

To the same effect are the following cases:

DeVaughn v. Hutchinson, 165 U. S. 566;
United States v. Crosby, 7 Cranch. 115;
Middleton v. McGrew, 23 Howard 45;
Lippincott v. Mitchell, 94 U. S. 767;
Washington v. Miller, 235 U. S. 422;
Buchser v. Buchser, 231 U. S. 157;
Elmendorf v. Taylor, 10 Wheat. 152, 159;

Hines Yellow Pines Trustees v. Martin, 268 U. S. 458, 464;

Knights v. Meyer, 265 U. S. 30;

Bucher v. Cheshire R. Co., 125 U. S. 555;

Burgess v. Seligman, 107 U. S. 20, 27.

In *Ohio v. Agler,* 280 U. S. 379, this Court said:

"It has been understood that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.' (Re *Burrus,* 136 U. S. 586, 593, 594.)"

In the same opinion, the court said:

"In the absence of any prohibition in the Constitution or laws of the United States, it is for the state to decide how far it will go."

Among the most fundamental of all the powers reserved to the several states as a necessary part of their sovereignty, is the power to regulate marriage with its resulting effects on the proprietary rights of the spouses. No part of that power has been conferred on the Federal Government. The same is true of titles to property, rights of enjoyment thereof, and the creation of property rights. Except only as restrained by the Fourteenth Amendment, the powers of the states in these respects are sovereign and unlimited.

Wherever any Attorney General of the United States has been called upon to rule on any such question, the principle now asserted has been upheld and emphasized. In the opinion of the Attorney General rendered February 26, 1921 (32 Op. Attys. Gen. 435), the Attorney General said:

"In *Warburton v. White,* 176 U. S. 484, 496, the principle was enunciated that where State decisions have interpreted State laws governing property or controlling relations that are essentially of a domestic and State nature the United States Supreme

Court will follow the State decisions if possible to do so, in the discharge of its duties. Also in *DeVaughn v. Hutchinson,* 165 U. S. 566, 570, it was held that to the law of the State in which property is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. In *United States v. Crosby,* 7 Cranch. 155, it was held that the title to land can be acquired and lost only in the manner prescribed by the law of the place where the same is situated."

The present Attorney General of the United States, in the opinion of July 16, 1927 (35 Op. Attys. Gen. 265), adhered to the same principle, saying:

"The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income if that income *belongs* to him, and to prevent the wife from returning a share of the community income as her own unless that share *belongs* to her. * * * The nature and extent of a wife's interest in community income in any of these states is to be determined from the statutes and decisions *of the state.* In determining the nature of an interest in community income, created by state law, it is necessary for the Federal courts to accept the decisions of the state courts construing the statutes creating the interest and to determine from the statutes and decisions of the state courts the intrinsic nature of that interest."

To the same effect is General Counsel's Memorandum 6351, which says, "In this manner the federal courts apply the state law in determining the owner of the fund regarded as income, and so ascertain the person to whom that income is to be taxed."

It would be nothing short of revolutionary to hold that the sovereign powers of the states, in respect to the determination of these questions of domestic relations

and property rights, has passed to any extent under Federal control. The upholding of state rights with respect to these vital issues is of transcendent importance in the preservation of this Government.

There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England, as adopted by the several states, each for itself, applied as its local law, *and subject to such alteration as may be provided by its own statutes. Smith v. Alabama,* 124 U. S. 465. In that case, this Court said:

> "It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the state, without regard to their pursuits, is subject to change *at the will of the legislature of each state,* except as that will may be restrained by the constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law, the observance of which the state undertakes to enforce as its public policy. And *it was in contemplation of the continued existence of this separate system of law in each state that the constitution of the United States was framed* and ordained with such legislative powers as are therein granted expressly or by reasonable implication."

The principle is well expressed by the Supreme Court of Washington in *Curry v. Wilson,* 57 Wash. 509, where the court said:

> "The right of the state to fix the character of property acquired by its citizens and the terms under which it shall be holden, is a right of sovereignty and a matter in which the Congress of the United States can have no concern."

Except as restricted by the Fourteenth Amendment,

each state is as sovereign with respect to these powers as if it had remained outside of the Federal Union.

In speaking of the power of the state to control and regulate property rights of married persons, this Court said:

> "Marriage is a civil institution, a status, in reference to which Mr. Bishop has well said, 'Public interests over-shadow private—one which public policy holds specially in the hands of the law for the public good, and over which the law presides in a manner not known in the other departments.'"
>
> *Neilson v. Kilgore,* 145 U. S. 487.

ARGUMENT POINT II. The meaning and effect of the Revenue Act of 1926.

A.—HUSBANDS AND WIVES, AS INDIVIDUALS, ARE AUTHORIZED AND PERMITTED BY THE EXPRESS TERMS OF THE REVENUE ACT OF 1926 TO MAKE SEPARATE RETURNS AND TO INCLUDE IN SUCH RETURNS, AS THE INCOME OF EACH SPOUSE, ONE-HALF OF THE COMMUNITY INCOME.

Each of the statutes levying income tax undertakes to tax the net income of each individual citizen of the United States. The Act of 1913 assessed a tax—

> "upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States."

Through all of the succeeding acts down to and including the Act of 1926 (and also thereafter) the language employed has in substantially the same terms levied a tax upon the net income of each *individual* however acquired.

The Revenue Act of 1926, under the heading of "In-

dividuals'' and under the heading of ''Individual Returns'' enacts:

''INDIVIDUALS

Normal Tax

Sec. 210. (a) In lieu of the tax imposed by Section 210 of the Revenue Act of 1924, there shall be levied, collected and paid for each taxable year *upon the net income of every individual* (except as provided in subdivision [b] of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in Section 216, etc.

Surtax

Sec. 211. (a) In lieu of the tax imposed by Section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by Section 210 of this Act, there shall be levied, collected, and paid for each taxable year *upon the net income of every individual* a surtax as follows: etc.

Individual Returns

Sec. 223. (a) *The following individuals shall each* make under oath a return stating specifically the items *of his gross income* and the deductions and credits allowed under this title—(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife; (2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and (3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

Sec. 223. (b) *If a husband and wife living together* have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—(1) *Each shall make such a return, or* (2) *The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.*

Sec. 216. (c) A husband and wife living together, shall receive but one personal exemption. The amount of such personal exemption shall be $3,500. *If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.*"

The above sections of the Revenue Act, it is to be noted, give to husbands and wives a right to elect to file separate returns or a single joint return, and plainly state that the *income of each* may be included in separate returns, or consolidated in a single return. The language of the statute quoted above expressly and clearly authorizes the filing of separate returns by husband and wife to eliminate the calculation of their tax liability "on the aggregate income." This is the procedure which has been followed for years in Washington and six other states under the rulings and regulations of the Internal Revenue Department, and in accordance with the opinions of three Attorneys General of the United States. This was the procedure followed by the plaintiff and his wife in this case.

The language we have quoted pertinent to this discussion is the same as the language of the preceding Revenue Acts dealing with this subject.

B.—THE ASSOCIATION OF HUSBAND AND WIFE IN THE MARRIAGE RELATION DOES NOT COME WITHIN THE MEANING OR CLASSIFICATION OF TRUSTS, CORPORATIONS, JOINT STOCK COMPANIES AND ASSOCIATIONS AS DESCRIBED IN THE REVENUE ACT OF 1926. *THE ONLY PROVISIONS OF THE ACT APPLICABLE TO COMMUNITY INCOMES ARE THOSE RELATING TO INDIVIDUALS OR POSSIBLY PARTNERSHIPS.*

We do not understand that the affirmative of this proposition has ever been asserted by the Government.

Husbands and wives all over the United States own property and receive income, the title to which income is determined wholly under the laws of the state in which the husband and wife reside. Sec. 223 (b) above quoted establishes the uniform law of husbands and wives throughout the United States imposed by Congress with respect to the income tax, and there is nothing in that section or in any other section which would warrant the classification of the marital relation in Washington as different from that to be applied in New York or any other state.

As shown, the Revenue Act of 1926, as well as previous acts, imposes a Federal income tax on *individuals* and, under the heading "Individuals," expressly permits husbands and wives to make separate returns of their income (Sec. 223 [a] [b]). We submit that language could not be plainer in authorizing and permitting the plaintiff in this case and his wife to report separately one-half of the community income if, *by the law of the state,* the income *belongs* to them. It is to be noted that, after imposing an income tax on individuals, including husbands and wives as such individuals, by the language of the Act that we have already discussed, the Act then expressly defines and classifies as entities, for purposes of taxation, trusts, corporations, joint stock companies and associations. (Sec. 219, a, b, c, d, e, f, g, h; 225, 230, 231, 232, 233, etc.)

In the case of a trustee, where the income is distributed to the beneficiaries, the income tax is assessed against the beneficiaries and not against the trustee. Sec. 219 (b) (2). In certain cases where the income is retained by the trustee or is distributed only under certain conditions, the income is taxed to the trustee. Sec. 219 (a). In any case, the tax assessed against a trustee is paid by the trustee and based upon the income from the *trust estate,* and has *nothing to do with the separate individual return* of the person who happens to be trustee or the calculation of his *individual* income tax.

The marital relation, known as the community, cannot be held to come within the meaning and description of trusts, as defined and described in the Revenue Act. In the State of Washington, the community system involves no trust whatever, as the interest of both husband and wife in the community property is a legal interest, each spouse being the legal owner and the holder of the legal title thereto as much as the other.

Mabie v. Whittaker, 10 Wash. 656;
Schramm v. Steele, 97 Wash. 309;
Marston v. Rue, 92 Wash. 129;
Stewart v. Bank of Endicott, 82 Wash. 106.

The community is a relationship *sui generis* and has never been described or classified in either the civil or common law jurisprudence as a trust. As hereinbefore shown under Argument Point I, the Supreme Court of Washington has said that the relationship approaches more nearly to that of a universal partnership than to any other business relationship, and the Washington court approves the statement in 31 C. J. p. 9, to the effect that—

> "In a restricted sense, the community of property between the husband and wife is a partnership between the husband and wife, but, while in many respects it bears a close analogy to an ordinary partnership, the analogy is not complete, and in no exact sense can it be denominated a partnership." This brief, pp. 30, 31.

Certainly, there is nothing in the Revenue Act of 1926, or any of its predecessors, indicating a congressional intent to treat a husband and wife as a trust, corporation, joint stock company or association.

If the relationship were, by positive statute, declared to be a trust, even then without a positive statutory enactment (whose constitutionality would in such a case be more than doubtful), the individual denominated a trustee would not be required to add his individual income to the income of the trust estate under his administration for the pur-

pose of calculating the surtax. A trustee makes a separate return as an individual in which is included his personal income, and makes another separate return as trustee for the trust estate in which is included the income from the property belonging to the beneficiaries, which is under his control. If, therefore, we should assume for the purpose of argument that the husband as managing partner could be considered a trustee for his wife as to her share of the entire community partnership and community income (which inference would be in direct conflict with the Washington statutes and decisions) even then, the husband would be required under the plain language of the Revenue Act to make a separate return as trustee of that part of the community income accruing to the wife (for which he would, under that hypothesis, be trustee) and another and separate return in his own behalf as an individual.

It must be remembered that in the *Robbins* case, 269 U. S. 315, so much relied upon by the Government, it was clearly held that under the California law there construed in connection with the Revenue Act of 1918, the husband must include in his individual separate return not only the half of the community income claimed by himself, but also the other half of the community income claimed by the wife, and that the entire income must be treated as one in computing the husband's individual surtax. This is plainly on the ground that, under the California law, the husband is really the owner of the entire income. If the court had been of opinion that the husband in California received part of the income for himself and part as trustee for his wife, an entirely different result would have been reached. The real question therefore is, "To what *individual* does the income *belong?*" Or (what is the same thing) "*Of* what *individual* is it the income?"

On the other hand, if it be determined that the community relation, being in the nature of a partner-

ship, is included in the partnership provisions of the Revenue Act, then it would fall within the provisions of Sec. 218 (a), reading:

> "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

We must therefore revert, in any case, to the position that the husband and the wife is each an individual and is taxed as such by the Revenue Act which levies a tax "upon the net income of every individual." It is too plain for argument that the net income *of* an individual is the net income *belonging* to that individual. This is the interpretation put upon the Act by the several Attorneys General and it is the plain meaning of the words employed. As said by the present Attorney General in the opinion of July 16, 1927 (35 Op. Attys. Gen. 265), the revenue acts have been so drafted as to tax the community income of the husband, if that income *belongs* to him, and to tax it to the wife if that income *belongs* to her.

In the case at bar, *it happens that appellee, the husband, had no income from any separate estate in the year* 1927. Neither did the wife. Nevertheless, the general question of the meaning of the Revenue Act in taxing individuals is presented to the Court, because the Revenue Act cannot be interpreted in this case without involving the question whether the community income so belongs to the husband that, if he has also a separate income, the two are to be added together and taxed to the husband as an entirety. To tax the husband on the entire income plus his separate income would not only be an injustice, and contrary, we submit, to the plain intent of the Revenue Act, but, as we point out later, would also be unconstitutional. If the husband could be held to be a trustee as to that part of the community income accruing to the wife, there is nothing in the trustee provisions of the Revenue Act which would justify *adding such trustee income* to the separate income of the husband and taxing

and surtaxing them as an entirely. The husband might be required to act as a withholding agent if in fact any of the wife's income passed through his hands, but that is not what appellant is asking here.

C.—SINCE CONGRESS HAS NO POWER TO LEGISLATE AS TO DOMESTIC RELATIONS, PROPRIETARY INTERESTS IN PROPERTY AND THE ORIGIN OF OWNERSHIPS (THESE QUESTIONS BEING EXCLUSIVELY WITHIN THE POWERS OF THE STATES), THE ONLY WAY TO GIVE EFFECT TO THE LANGUAGE OF THE REVENUE ACT LEVYING TAXES "UPON THE NET INCOME OF EVERY INDIVIDUAL" IS TO ACCEPT THE STATE LAWS AND DECISIONS AS FINAL ON THE QUESTION OF OWNERSHIP. WHETHER OR NOT CONGRESS COULD CONSTITUTIONALLY DEPART FROM THE STATE LAW GOVERNING OWNERSHIP, IT HAS NOT ATTEMPTED TO DO SO IN THE REVENUE ACT OF 1926 OR IN ANY OTHER INCOME TAX LAW.

Assuming, for the sake of argument, that Congress might undertake to enact specific provisions, by which every possible departure from the common law principles governing husband and wife and the origin of property titles might be met,* Congress has never attempted to do so. The task would be enormous.

Every state in the Union has changed the common law concerning the property rights of husband and wife. The common law system was barbarous and this barbarity has been universally acknowledged in modern times. There is no "common law" state in this regard, no state which has not very seriously changed the rules of the common law concerning husband and wife and their property rights.

What law, therefore, has Congress had in mind in its various revenue acts taxing "the net income *of* every in-

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* by specific provisions for taxation.

dividual?" Plainly, not the common law. Plainly, not an amalgamation or averaging of the multitudinous variety of systems prevailing in the various states some of which are considered more or less "common law" states, and some "community property" states.

Clearly, Congress, in these income tax statutes, has of necessity accepted the property system prevailing *in each state,* regardless of the extent to which the common law has been departed from.

The husband at common law, as a result of the marriage, was entitled to the services of his wife, and consequently to her earnings; and even where a married woman carried on business in her own name, the avails of that business belonged to the husband. An agreement by the husband to pay his wife for performing the ordinary household duties was held at common law to be not only without consideration but to be against public policy.

Glenn v. Johnson, 18 Wall. 476;
Jackson v. Jackson, 91 U. S. 122;
13 Ruling Case Law, 1089.

While in parts of Appellant's brief it seems to be conceded that state statutes and decisions govern the ownership of income, Appellant (brief 16-17) appears to be unwilling to accept these as final, and seeks to have the Court (as we conceive) read into the Revenue Act an authority or permission to depart from the state's own idea of its property system whenever the Court (or possibly the Department) may think "a national system of taxation" requires a re-interpretation of what the state has declared. The community property states are made the field for the application of this theory. We submit, however, that there is no inequality among the states and no ground for departing from absolute adherence to state law in every case involving property or its ownership.

In all of the so called "common law" states, the

federal income tax acts are applied by giving full force and effect to the local statutes and decisions. It would be absurd to say that, in any state where the local statute protects the wife's separate earnings, her property and her recoveries for personal injuries, the wife's income from her earnings or from her choses in action, or other accumulations (accumulated by her during marriage) is assessed as income of the husband, because the state statute departs from the common law. The reason is because Congress necessarily, in enacting these taxing statutes, accepts as final the state rule of property governing husband and wife, whether it be common law or civil law or statutory.

At common law, the husband was entitled to the personal property of his wife, consisting of goods and chattels which she held in possession at the time of the marriage, and also any chattels accruing to the wife after the marriage. The same was true of choses in action belonging to the wife which the husband could reduce to his own possession and ownership at any time during the wife's life.

Bank of America v. Banks, 101 U. S. 240;
13 R. C. L., p. 1051, par. 72;
13 R. C. L., p. 1055, par. 77.

By the rules of the common law, further, marriage gave the husband a freehold tenure in the estates of inheritance of the wife, and the right to the rents and profits during their joint life.

Bank of America v. Banks, 101 U. S. 240.

Of course, none of these provisions of the common law are given any weight whatever in administering the federal income tax laws where a different rule of property is prescribed by the local state statute. Why? For the reason that each state has the absolute right to change the common law and to establish its own system of property rights of husband and wife.

Smith v. Alabama, 124 U. S. 465.

Consequently, in determining *of* what individual an income is, we must have regard solely to the state law in each of the several forty-eight states, regardless of what is the law in some other state or what was the common law. Congress, in enacting these statutes, had fully in mind the varying provisions of law in the various states, and intended that those respective laws should control regardless of any differences in the law of one state or another. Unless this principle is adhered to, the whole subject becomes chaos.

The contention of the Government here substantially is that this Court should endeavor to establish some sort of a law of property rights of husband and wife, by "averaging" in some undefined way the laws of the several states, or giving effect in the State of Washington to principles of the common law or statutory provisions enacted in other states, though wholly differing from the statutory provisions in force in Washington. To attempt to do this would be legislation. If legislation along this line would be constitutional, it is for Congress to enact it by specific statutory provisions.

ARGUMENT POINT III. Discussion of departmental and legislative history in connection with the filing of separate returns by husbands and wives in community property states.

A.—BRIEF REVIEW OF THE LEGISLATIVE AND DEPARTMENTAL RECORD RELATING TO THE SEVERAL REVENUE ACTS AND THE ATTEMPTS MADE TO CHANGE THE LANGUAGE THEREOF.

This subject is treated at length in the joint brief filed in this Court by counsel representing the present appellee, Seaborn, and by counsel for appellees in the Texas case,

Hopkins v. Bacon, in the Louisiana case, *Bender v. Pfaff,* and in the Arizona case, *Goodell v. Koch.* However, it seems appropriate here to refer briefly to that feature of the case.

In 1914, under Treasury Decisions 2090 and 2137, the Treasury Department ruled that income taxes are imposed upon each individual and that the separate incomes of husbands and wives should not be combined for the purpose of assessing surtaxes on the aggregate.

In April, 1920, Commissioner's Office Decision 426, 2 C. B. 198, authorized returns dividing income between husbands and wives in Texas and Washington *as to income from accumulated community property,* real and personal.

In August-September, 1920, the Attorney General advised that husbands and wives in Texas may make separate returns dividing equally their total community earnings as well as the income derived from accumulated property (32 Op. Attys. Gen. 298), and this opinion was promulgated as Treasury Decision 3071, 3 C. B. 221.

On February 26, 1921, appeared the further opinion of the Attorney General (32 Op. Attys. Gen. 435) definitely interpreting the revenue acts as applied to the Community property system in the State of Washington, saying that:

> "It appears to be the settled law of that state that the wife has, during coverture as well as upon the dissolution of the marriage, a vested and definite interest and title in community property, equal in all respects to the interest and title of her husband therein" (citing cases).

The Attorney General announced the same principle as applying to the other community property states except California, but repeating that the wife's rights are more fully recognized in the State of Washington, calling attention to the statutory provisions and decisions of that

state, including the wife's power of testamentary disposition of one-half, and the husband's inability to dispose of or encumber real estate without the wife's joining. This holding became established as a regulation in Treasury Decision 3138.

In 1921, an attempt was made at the instance of the Treasury Department to have the revenue act of that year include a paragraph which would make the revenue act read as the government now contends it should read by interpretation. The clause proposed to be inserted was "income received by any community shall be included in the gross income of the spouse having management and control of the community property." The Revenue Act of 1921, as reported in the Ways and Means Committee of the House, and as it passed the House, contained that clause. The Finance Committee of the Senate, in November, 1921, inserted an even more positive clause to the same effect. After extensive debate in the Senate, this proposed addition was refused approval by Congress, and the Revenue Act of 1921 retained the language which had already been interpreted by the Attorney General and the Treasury Department (imposing a tax upon the net income *of every individual*), that being the same language which has since been retained in all the revenue acts, including that of 1926. The debates show that Congress was fully aware of the practice of divided individual returns in the community property states, established pursuant to the Attorney General's several opinions.

Again, in 1923, the House Bill which later became the Revenue Act of 1924, as introduced in the House, contained the same proposed new provision which would include community income as a part of the gross income of the spouse having the management and control of the community property. This provision got no farther than the Committee on Ways and Means of the House, which reported the Bill with the proposed new clause eliminated.

The congressional debates are referred to in the separate joint brief filed by counsel in the four pending cases.

Thus, ever since 1920, by departmental construction and regulations, approved by congressional action, husbands and wives in the seven community property states (not including California) have filed individual returns, dividing the community income, each spouse returning and paying taxes on one-half of that income. The Treasury Department (as pointed out in the *Robbins* case) ruled to the contrary as to California. As to the other seven community property states, it has been the established practice for ten years, and is the practice now in force.

The chronological table, Appendix B of this brief, shows the principal facts in this connection.

B.—PURSUANT TO THE REPEATED HOLDINGS OF THIS COURT THAT, IN THE INTERPRETATION OF A DOUBTFUL OR AMBIGUOUS STATUTE, THE UNIFORM EXECUTIVE CONSTRUCTION AND ADMINISTRATIVE PRACTICE WILL BE GIVEN GREAT WEIGHT AND THAT THE CONGRESSIONAL RE-ENACTMENT OF A STATUTE IN LANGUAGE WHICH HAS PREVIOUSLY RECEIVED A UNIFORM EXECUTIVE CONSTRUCTION AMOUNTS TO AN ADOPTION BY CONGRESS OF THAT CONSTRUCTION, THE NOW EXISTING PRACTICAL CONSTRUCTION OF THE REVENUE ACTS SHOULD BE UPHELD AND FOLLOWED.

The proposition above stated involves two distinct elements, namely, the great weight given by the courts to the construction of a statute shown by continued administrative interpretation and procedure, and the effect given to a re-enactment of a statute in language which has previously received executive construction. In many cases, however, this Court has applied both principles in unified form.

The first part of the proposition is illustrated by the holding of this Court in *New York v. Illinois,* 278 U. S. 367, to the effect that:

"Nothing is more convincing in the interpretation of a doubtful or ambiguous statute than uniform, administrative practice for a series of years."

To the same effect are:

Copper Queen Mining Co. v. Arizona Board of Equalization, 206 U. S. 474;

United States v. Sweet, 189 U. S. 471;

United States v. Johnston, 124 U. S. 236;

United States v. Farrar, ... U. S. .... (May 26, 1930);

Luckenbach S. S. Co. v. United States, 280 U. S. 173;

Lucas v. American Code Co., 280 U. S. 445;

United States v. Midwest Oil Co., 236 U. S. 459, 472, where the court said:

"Government is a practical affair intended for practical men. Both officers, law makers and citizens naturally adjust themselves to any long continued action of the Executive Department on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a serious and quieting rule that in determining the meaning of a statute or the existence of a power weight should be given to the usage itself, even when the validity of the practice is the subject of investigation."

As to the second part of the above stated proposition, namely the effect of the re-enactment of a statute by Congress after it has received executive construction, the principle is well stated in *United States v. Cerecedo Hermanos,* 209 U. S. 338, where the court said:

"And we have decided that the re-enactment by Congress, without change, of a statute which had pre-

viously received long-continued executive construction, is an adoption by Congress of such construction."

To the same effect are the following cases:

Komada v. United States, 215 U. S. 392;
Heald v. District of Columbia, 254 U. S. 20;
National Lead Co. v. United States, 252 U. S. 140;
Brewster v. Gage, 280 U. S. 327;
United States v. G. Falk & Brother, 204 U. S. 143;
Lash's Products Co. v. United States, 278 U. S. 175;
Provost v. United States, 269 U. S. 443.

In the case last cited the court said:

"The subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them."

The Court noted that the regulations were of special weight because "prepared by the Department, charged with the duty of enforcing the Act."

Where the statute directs the Secretary, as the head of the Department, "to make the necessary regulations to carry out the purposes" of the enactment, the interpretation of the Department acquires additional strength as these regulations have the force of law.

Jacobs v. Pritchard, 223 U. S. 200.

The existing practice of individual returns by husband and wife dividing the community income has prevailed for ten years in seven states and has produced no difficulty or friction whatever. Taxation being a practical matter, it is evident that the tax payers in these several states have adjusted their affairs to fit the regulations and rulings so made. Congress has by its direct action refused to change the language of the Revenue Acts which have been constantly interpreted to sustain the prevailing practice. If there ever was a situation calling for the application of the principles above stated, this case is such a case *par excellence.*

Further facts and argument in support of this point (departmental and legislative history) are given in the Joint Brief filed herein by counsel for appellees in the four pending cases.

ARGUMENT POINT IV. The decision in the *Robbins* Case, 269 U. S. 315, is not in point in the present case which concerns the federal taxation of community incomes in the state of Washington.

A.—THE FUNDAMENTAL DIFFERENCES BETWEEN THE COMMUNITY PROPERTY SYSTEM PREVAILING IN THE STATE OF WASHINGTON AND THAT PREVAILING IN CALIFORNIA REQUIRE THE HOLDING THAT THE OPINION IN THE *ROBBINS* CASE IS NOT HERE APPLICABLE.

In the *Robbins* case it is decided that the entire community income in California is the property of the husband and should be taxed to him. This is based upon the proposition that the wife in California has no such vested property rights in the community income as to entitle her to return one-half thereof as her own. In other words, it was decided that the community income in California was not, as to any part thereof, the income of the wife under the Revenue Act of 1918. It is recognized in the opinion that there is a distinction between the law of California and that of other community property states, as shown by commentators and the action of the Treasury Department, the Court citing the Treasury regulations which make a distinction between California on the one hand and the other community property states on the other.

But in the final paragraph of the *Robbins* case the opinion considers in detail a number of the provisions of the California law and arrives at the conclusion that there

was power and intent on the part of Congress to tax the entire community income to the husband by reason of the particular provisions of the California law. The Court then recites those California provisions.

None of the reasons stated in the final paragraph of the opinion in the *Robbins* case leading to the conclusion therein stated is applicable to the State of Washington, whose laws contain none of the provisions mentioned by the Court as existing in California.

The following summary demonstrates this:

(a) Under the statutes and decisions of the State of Washington it is not true that the husband alone has the disposition of the community fund. As to real estate he can neither convey, mortgage nor lease it without the wife's joinder, vitally differing from California. As to personal property his power of control is merely that of an agent, and he is held to the rules of agency. The "obvious purpose" of the Washington law is to make the interest of the two spouses equal.

Schramm v. Steele, 97 Wash. 309;
Olive Co. v. Meek, 103 Wash. 467;
Holyoke v. Jackson, 3 Wash. Ter. 235;
Mabie v. Whittaker, 10 Wash. 656;
Warburton v. White, 176 U. S. 484 (from Washington);
Buchser v. Buchser, 231 U. S. 157 (from Washington);
Kaufman v. Perkins, 114 Wash. 40.

(b) In Washington the husband cannot spend the community fund substantially as he chooses, and it is not true that if he wastes it in debauchery the wife has no redress.

Stewart v. Bank of Endicott, 82 Wash. 106;
Marston v. Rue, 92 Wash. 129;
Parker v. Parker, 121 Wash. 24;
Schramm v. Steele, 97 Wash. 309.

(c) The husband and wife in Washington are made by

the community property statute jointly and severally liable for all expenses of the family, including the support and education of the children, thus confirming the idea of the universal partnership.

Remington Comp. Stat. Wash., Sec. 6906;
Hector v. Hector, 51 Wash. 434.

(d) In a suit for separate maintenance in Washington the existence of community property (in which the wife is expressly held to have a half interest) is the controlling consideration.

Kimble v. Kimble, 17 Wash. 75;
State ex rel. Lloyd v. Superior Court, 55 Wash. 347.

(e) Neither is it true in Washington that the community property while liable to be taken for the husband's debts, is not liable to be taken for the wife's. In Washington the community property cannot be taken for the husband's separate debt, no more than it can be taken for the wife's separate debt, whereas in California the community property, real and personal, is liable for husband's separate debt.

Olive Co. v. Meek, 103 Wash. 467;
Snyder v. Stringer, 116 Wash. 131;
Coles v. McNamara, 131 Wash. 691;
Peterson v. Zimmerman, 142 Wash. 385.

(f) In order that community property in Washington may be taken for a debt contracted by either husband or wife, the debt must be shown to be a debt contracted in behalf of the community, and both husband and wife are individually entitled to their day in court on the determination of this question. A judgment against the husband alone does not settle the point.

Littell Mfg. Co. v. Miller, 3 Wash. 480;
McDonough v. Craig, 10 Wash. 239;
Allen v. Chambers, 18 Wash. 341; 51 Pac. 478;
Day v. Henry, 1 Wash. 61;
Brotton v. Langert, 81 Wash. 73.

(g) In Washington the wife's actual vested interest enables her to dispose of by will, or leave to her heirs, *her half* of the community property. She may will her one-half to strangers or to any of her friends or to charity or otherwise without limit. Rem. Code, Sec. 1342 (Appendix A, page 143. If the wife dies and the husband survives, the wife's legatees, devisees or children immediately take possession of the wife's *half of the community property* and of all community business connected therewith. By the California law, as construed in the *Robbins* case, the directly opposite rule prevails; the death of the wife leaves the husband in full possession of the title and enjoyment of the community property. In California the wife cannot dispose by will of any interest in the community property prior to the death of her husband.

(h) The several sections of the Washington Statutes (Appendix A, pages 135-143) recognize fully the actual ownership by the wife of her interest in the community property, and the Courts are outspoken in protecting that interest against invasion by the husband other than by his exercising the statutory power of attorney giving him limited authority of management and control. Certain of these sections expressly provide (Sec. 10572, 10575) that either spouse may convey to the other his or her community interest in the community property.

(i) In the *Robbins* case the Court observed that he who has all the power should bear the burden. In Washington the husband is very far from having all the power as already shown.

B.—FURTHER CONSIDERATIONS LEAD TO THE CONCLUSION THAT THE *ROBBINS* CASE DID NOT DECIDE ANYTHING INVOLVED IN THE PRESENT CASE, THE COURT NOT HAVING CONSIDERED THE LONG AND UNIFORM EXECUTIVE AND LEGISLATIVE INTERPRETATION OF THE REVENUE ACTS WHICH IS PRESENTED HERE.

The decision in the *Robbins* case was in accordance with the Departmental rulings which had prevailed from the beginning. As stated by the Court in the first part of that opinion, the Treasury Department has made a distinction between California and the other community property states. Naturally, therefore, the long continued Executive construction as to the other seven community property states, strengthened and confirmed by the repeated re-enactments of the statute by Congress and its refusal to change the regulations and practice of divided returns by husband and wife, could not have been considered by the court, either expressly or impliedly, to be wrong (even if it be assumed that the court was advised of all the material facts in that regard). In fact, by upholding the Treasury Department so far as California is concerned, it cannot possibly be claimed that the court has made a ruling applicable to the situation presented here where the Executive and Legislative action support the existing practice for which we argue in Appellee's behalf. From the very nature of the case it is apparent that nothing in the *Robbins* case precludes the Court from now giving full force and effect to the Executive and Legislative construction (following the long and uninterrupted line of cases from this Court which we have cited).

Further, it is to be noted that no change in the existing practice was made by the Executive Department as a result of the decision in the *Robbins* case. The Treasury Department called upon the Attorney General for an opinion, which opinion was written by the present

Attorney General on July 16, 1927. (35 Op. Attys. Gen. 265.) The interpretation placed by the Attorney General upon the *Robbins* decision is entirely in accordance with the views for which we now contend. Among other things, the Attorney General says:

> "Your request for reconsideration followed the decision of the Supreme Court of the United States in the case of *United States v. Robbins,* 269 U. S. 315, decided January 4, 1926, in which it was held that the wife's interest in the community income under the *system in force in California* in 1918 *was not substantial* enough during the existence of the community to entitle her to separately return half of it as her income under the Revenue Act of 1918."

It is equally plain that the Attorney General did not consider that the question of the power and intent of Congress had been decided by this Court in a way applicable to any other community property state. The Attorney General says:

> "The questions involved *are not matters of construction of the Revenue Acts of the United States,* but involve the nature of the wife's interest in the community income. The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income *if that community income belongs to him,* and to prevent the wife from returning a share of the community income as her own *unless that share belongs to her.* * * * The nature and extent of a wife's interest in community income in any of the states is to be determined from the statutes and decisions of the state."

At a later point in the opinion the Attorney General says:

> "While I have acquired opinions on the subject as a result of the examination of the statutes and decisions of these states and the *proper answer to the ques-*

tion involved may be more evident as to some of the states than as to others, I believe for the reasons stated that it would be inappropriate and ineffective for me to deal with the subject in an opinion with a view to having your regulations and methods of dealing with community income changed."

In view of the fact that the opinion of the Attorney General on which the present practice of divided returns began (32 Ops. Atty. Gen. 435), emphasizes the property rights of the wife in the State of Washington as being pre-eminently established, it is submitted that the answer as to the State of Washington falls within the "more evident" class mentioned in this latest opinion.

It is evident that the Attorney General, in rendering this opinion in July, 1927, did not consider the decision in the *Robbins* case as having settled any question as to the power and intent of Congress in enacting the Revenue Acts, but that he entertained the view that the decision in the *Robbins* case must be restricted to the particular system existing in California and to those systems embodying the essential features of the California law stated by the Court.

ARGUMENT POINT V. It is established by a long line of decisions of this court that revenue statutes are not to be construed so as to enlarge their scope, but must be given a reasonable and fair application. In cases of doubt with respect to the imposition of a tax, the doubt is to be resolved against the government and in favor of the taxpayer.

This proposition, eminently just and necessary, has often been upheld by this Court.

Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199, affirmed 201 Fed. 918;

American Net & Twine Co. v. Worthington, 141 U. S. 468;

Benziger v. United States, 192 U. S. 38;

Eidman v. Martinez, 184 U. S. 578;

Gould v. Gould, 245 U. S. 151;

Shwab v. Doyle, 258 U. S. 529;

Reinecke v. Gardner, 277 U. S. 239;

Crocker v. Malley, 249 U. S. 223;

Scott v. Western Pac. R. Co., 246 Fed. 545;

United States v. Coulby, 251 Fed. 982, 258 Fed. 27;

United States v. Field, 255 U. S. 257;

Smietanka v. First Tr. & Sav. Bank, 268 Fed. 230, affirmed 257 U. S. 602;

United States v. Merriam, 263 U. S. 179.

In the case last cited, the Court said (repeating substantially the language of *Gould v. Gould,* 245 U. S. 151):

"On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

ARGUMENT POINT VI. Even if it could be held that Congress has the power to impose an income tax on the husband for the income owned by husband and wife under such a system as the community property system of the state of Washington, no such tax could be imposed until Congress should affirmatively legislate to that effect.

This proposition is really included, as a corollary, in the proposition last stated concerning the rule of construction applicable to taxing statutes.

Smietanka v. First Tr. & Sav. Bank, 268 Fed. 230; affirmed 257 U. S. 602.

In this case the Court declared that income held and accumulated by a trustee for the benefit of unborn and unascertained beneficiaries, not having been made taxable by any specific language of the Income Tax Law, such omission could not be supplied by judicial construction. The Court said:

> "This case is not unlike that of *United States v. Field,* 255 U. S. 257. * * * The government sought to tax property passing under a decedent's testamentary execution of a general power of appointment. * * * In the later act, such property was expressly included. This was thought by the court to show at least a legislative doubt whether the earlier act included such property. This court said (p. 264) that it would have been easy for Congress to express a purpose to tax such property, but it had not done so. In the Act of 1913, it would have been easy to require a trustee to pay an income tax on income received by him for unborn beneficiaries, or for the trust or the estate. But Congress did not do so. In the next Act, it did so. We cannot supply the omission in the earlier Act."

ARGUMENT POINT VII. To construe the revenue act of 1926 in accordance with the contentions of appellant would render that act unconstitutional so far as concerns the parts of the act now in controversy. It is the duty of the court so to construe the act (a) as to preserve its constitutionality, and (b) to avoid any construction that would create grave doubt of its constitutionality.

A.—STATEMENT OF THE CONSTITUTIONAL PROVISIONS WHICH WOULD BE INFRINGED BY CONSTRUING THE REVENUE ACT IN ACCORDANCE WITH THE CONTENTIONS OF APPELLANT.

To construe the Revenue Act in accordance with the contentions of appellant would violate the third clause of Sec. 2 of Article I of the Constitution of the United States, and the fourth clause of Sec. 9 of Article I. These clauses require that direct taxes shall be apportioned among the several states according to their respective numbers and that no direct tax shall be laid unless in proportion to the census directed by the Constitution to be taken.

Appellant's construction would also cause the revenue act to violate Sec. 8 of Article I, which requires that all duties, imposts and excises shall be uniform throughout the United States. Such construction would also violate the Fifth Amendment to the Constitution, which provides that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation. Such construction would also violate the Sixteenth Amendment to the Constitution empowering Congress to pay and collect taxes on incomes.

The violation of the Constitution by adopting the construction sought by appellant arises from the fact that,

under that construction, the revenue act would be inconsistent with these constitutional provisions, in that:

(a) It would require the collection from appellee of a tax based in whole or in part upon the income of Mrs. Seaborn.

(b) It would require the collection from appellee at progressive rates of a tax based not upon his income alone, but upon the combined incomes of appellee and Mrs. Seaborn thereby not only obliging appellee to pay upon an income not his own, but obliging him to pay at a higher rate upon his own income.

(c) It would prohibit appellee and Mrs. Seaborn from filing separate income tax returns including therein the income only belonging to and received by them, respectively (as defined by local state law), which right is allowed under the Revenue Act to citizens of other states, and would violate the uniformity of taxation clause of the United States Constitution.

(d) It would provide for the taking of the property of appellee without due process of law and deny to him the equal protection of the laws.

(e) So far as concerns all of the income taxed, other than salary, it would levy and require appellee Seaborn to pay a direct tax (*Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, and subsequent cases) upon the real estate and invested personal property owned by two persons, appellee and his wife, and upon the fruits and revenues thereof, in that a tax upon the income of real estate and invested personal property is a direct tax and must be apportioned among the several states in proportion to census, unless it is the income solely of the person taxed, in which case the Sixteenth Amendment permits the income tax to be laid against the owner of the income without apportionment (meaning the owner as defined by local state law).

(f) The reasons stated in the foregoing paragraphs apply

also to the tax assessed to appellee Seaborn upon the $15,000 of salary, for the reason that the Revenue Act of 1926 does not purport to levy an excise tax upon salaries applicable uniformly throughout the United States, but attempts to levy an income tax upon salaries *as the property of the person taxed,* as in the case of real estate and invested personal property, and the Act does not attempt to prescribe a constitutional method of taxing to the husband alone income belonging (by state law) to the husband and wife. As the salary was the actual property of appellee and his wife from the moment of its earning, it cannot be taxed to appellee alone unless possibly by some form of excise which would operate uniformly throughout the United States for the taxation to the husband alone of salaries belonging to husband and wife,

(g) The Act construed as contended by appellant would as to appellee, be arbitrary and capricious, in that it would use, as a basis and as the subject of the tax assessed against him at progressive rates, the combined incomes of himself and his wife, instead of the income of appellee alone.

(h) As to all of these objections, ownership must be taken conclusively as defined by local state law. If an excise is based on *something other than ownership,* it must *define the thing excised* so as to operate *uniformly on that thing* throughout the United States.

B.—IT FOLLOWS FROM THE CASE OF *POLLOCK V. FARMERS LOAN & TRUST COMPANY*, 158 U. S. 601, AND THE CASES WHICH HAVE FOLLOWED IT, THAT TAXES ON RENTS, INCOME OR PROFITS OF REAL ESTATE AND PERSONAL PROPERTY ARE DIRECT TAXES UPON THE PROPERTY ITSELF WHOSE INCOME IS TAXED. IF, THEREFORE, UNDER STATE LAW, THE REAL ESTATE AND PERSONAL PROPERTY SO TAXED ARE OWNED BY TWO PERSONS, AN INCOME TAX THEREON CANNOT BE LEVIED WITHOUT APPORTIONMENT AGAINST ONLY ONE OF THE OWNERS, AS THE SIXTEENTH AMENDMENT DOES NOT CHANGE THE DIRECT NATURE OF THE TAX WHICH NECESSARILY FOLLOWS OWNERSHIP, BUT ONLY DISPENSES WITH THE NECESSITY OF APPORTIONMENT.

Pollock v. Farmers Loan & Trust Company, 158 U. S. 601, holds in the clearest terms that the tax assessed in this case upon the rents, issues and profits of the accumulated real estate and personal property is a direct tax on all of that property. It follows, therefore, that such tax, to be valid, would have to be apportioned unless the tax falls within the provisions of the Sixteenth Amendment. That amendment, however, it has been distinctly held by this Court, *does not enable Congress to define incomes* and does not change the direct character of an income tax as fixed by the *Pollock* case, which *direct tax must be based on ownership.*

Of course, we must look entirely to state law to ascertain who is the owner of the real and personal property whose income is taxed.

Questions of control, management, and the like, are without significance in this connection. Ownership is the only test.

In *Eisner v. Macomber*, 252 U. S. 189 (the second stock dividend case), the opinion of the Court, referring

to the first stock dividend case (*Towne v. Eisner*, 245 U. S. 418) said:

> "The court treated the construction of the Act (of October 3, 1913) as inseparable from the interpretation of the 16th Amendment; and having referred to Income Tax Cases (*Pollock v. Farmers Loan & Trust Co.*) 158 U. S. 601, 39 L. Ed. 1108, and quoted the Amendment, proceeded very properly to say (p. 704): 'It is manifest that the stock dividend in question cannot be reached by the Income Tax Act, and could not, even though Congress expressly declared it to be taxable as income, *unless it is in fact income.*' "

Later in the opinion in *Eisner v. Macomber* (p. 205), the Court says:

> "The 16th Amendment must be construed in connection with the taxing clauses of the original constitution and the effect attributed to them before the Amendment was adopted. In Income Tax cases (*Pollock v. Farmers Loan & T. Co.*) 158 U. S. 601, under the Act of August 27, 1894, *it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership;* and that Congress could not impose such taxes without apportioning them among the states according to population, as required by Art. 1, Sec. 2, cl. 3, and Sec. 9, cl. 4, of the original Constitution.
>
> "Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the 16th Amendment was adopted, in words lucidly expressing the object to be accomplished; 'The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several states and with-

out regard to any census or enumeration.' As repeatedly held, this did not extend the taxing power to new subjects, but *merely removed the necessity which otherwise might exist for an apportionment* among the states of taxes laid on income. *Brushaber v. Union P. R. Co.*, 240 U. S. 1, 17, 19, 60 L. ed. 493, 501, 502; *Stanton v. Baltic Min. Co.*, 240 U. S. 103, 112 *et seq.* 60 L. ed. 546, 553; *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 172, 173, 62 L. ed. 1049-1051.

"A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall *not be extended by loose construction*, so as to repeal or modify, except as applied to income, those provisions of the constitution that require an apportionment according to population for direct taxes upon property, real and personal. *This limitation still has an appropriate and important function, and is not to be over-ridden by Congress or disregarded by the courts.*"

Later, in the same case, the Court defined income as follows:

"'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle* case (*Doyle v. Mitchell Bros. Co.*, 247 U. S. 179, 185)."

The Court also said:

"Here we have the essential matter: * * * a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being '*derived*,' that is, *received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal; *that* is income derived from property. Nothing else answers the description."

(The italics in the last quoted paragraph are those of the Court).

The dissenting opinion in *Eisner v. Macomber* puts in clear relief the substantial holding of the Court, the dissenting opinion taking the ground that the word "incomes" in the Sixteenth Amendment was used, not in the sense announced in the opinion of the Court, but in a broader sense conforming to a supposed common understanding among the public. Nevertheless the above quoted declaration as to the meaning and effect of the Sixteenth Amendment has been expressly reaffirmed by this Court and is the established law.

In *Bromley v. McCaughn*, 280 U. S. 124, this Court sustained the validity of the gift tax imposed by Sec. 319 (a) of the Revenue Act of 1924. In the opinion of the Court, it is said:

> "Whatever may be the precise line which sets off direct taxes from others, we need not now determine. While taxes levied upon or collected from persons *because of their general ownership of property*, may be taken to be direct (*Pollock v. Farmers Loan & T. Co.*, 157 U. S. 429, 39 L. Ed. 759, 158 U. S. 601, 39 L. Ed. 1108), this court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property *or the exercise of a single power over property incidental to ownership*, is an excise which need not be apportioned, and it is enough for present purposes that this tax is of the latter class."

In the case at bar, it is not claimed by appellant, nor could it be claimed, that there is a single word in the Revenue Act of 1926, applicable to the tax now in question, imposing an excise upon a particular use of property or the exercise of any single power over property incidental to ownership. The plain fact is that it is ownership

of the income (necessarily including the ownership of the real and personal property which gives rise to the income) that is the basis of the tax now before the Court. How is this ownership to be determined? Necessarily, by state law, because the state is the only authority having any power to legislate on the subject of property ownership and the property rights of married persons.

In the case of *Bromley v. McCaughn,* 280 U. S. 124, the Court added:

> "It is true that in each of these cases the tax was imposed upon the exercise of *one* of the numerous rights of property, but each is clearly distinguishable from a *tax which falls upon the owner merely because he is owner,* regardless of the use or disposition made of his property. See *Billings v. United States, supra.*"

Later in the opinion, the Court said:

> "It (the gift tax) falls, rather, into that category of imposts or excises which, since they apply only to a *limited exercise* of property rights, have been deemed to be *indirect* and so valid although not apportioned.
>
> "The uniformity of taxation throughout the United States enjoined by Article 1, Section 8, is geographic, not intrinsic."

In *Taft v. Bowers,* 278 U. S. 470, this Court upheld the validity of Secs. 202 and 213 of the Revenue Act of 1921, which require the donee of a gift to pay an income tax on the capital gain, based on the cost of the gift to the donor. In the unanimous opinion of the Court, it is said:

> "Under former decisions here the settled doctrine is that the 16th Amendment confers *no power upon Congress to define and tax as income* without apportionment something which theretofore *could not have been properly regarded as income.*"

These decisions, we submit, establish beyond question that, so far as concerns the income of accumulated real or

personal property, the effect of the Sixteenth Amendment is merely to permit the direct tax, imposed on the income of that property, to be levied without apportionment. The tax is still a direct tax on the property itself, real or personal. Further, the tax is imposed because of ownership, as this Court has emphatically declared. It is not a question of management or control, but solely of ownership. That ownership must be determined by state law.

In ruling upon an analogous question of state taxation, this Court said, in *Home Savings Bank v. Des Moines*, 205 U. S. 503:

> "Taxes are assessed against persons upon the property which they own, not upon property which others own. We should be reluctant to suppose that there has been any departure from this principle in this law."

The line separating federal jurisdiction from state jurisdiction in this connection is very clear. There is no twilight zone. In determining ownership, the origin of titles to property, the transfer of titles, and the effect of the marriage relation on the property rights of the spouses, are all subjects of legislation purely within the sovereign powers of the states. Congress has no more to do with those subjects than if the Federal Union had not been formed.

On the other hand, the levying of federal taxes is within the power of the federal government, subject to such limitations only as the federal constitution prescribes. One of the limitations here is that an income tax on the rents, issues and profits of real or personal property is a direct tax on that property and such tax falls upon the owner under the established construction of the Sixteenth Amendment.

The Sixteenth Amendment, and the federal statutes passed pursuant thereto, must be applied separately to the rules of property in each state. There is no attempt,

either in the Sixteenth Amendment or in the laws enacted under it, to arrogate to the Federal Government any of the states' fundamental powers. The Sixteenth Amendment was adopted *in view of the diversity of the property systems in the several states,* and the Amendment takes those different property systems as it finds them. The same is true of the Revenue Act of Congress.

The Sixteenth Amendment is to be read, as applied to the laws of each state, precisely *as if the laws of that state prevailed in every one of the forty-eight states.* The law of one state can have no effect in applying the Sixteenth Amendment or the Revenue Acts in any other state. This individual sovereignty of the several states, preserving locally the absolute right to legislate on all questions of property, is one of the most important points in our federal system.

The federal system cannot survive unless the rights of the states in this regard are respected and upheld. We therefore assert that both the Sixteenth Amendment and the federal revenue acts are to be construed, as applied to ownerships in the state of Washington, precisely as if the community property system prevailing in the State of Washington prevailed in every one of the forty-eight states in identical terms. There is no other principle upon which the line of demarcation between the federal and state powers can be upheld.

So far, we have discussed this subject as if the income were all derived from accumulated real and personal property. There was a salary of $15,000, which was not the direct result of prior accumulations. However, this salary, from the moment of its inception, belonged to both husband and wife, Rem. Code, Sec. 6892, Appendix A, page 135. The husband could not have assigned it without the written joinder of his wife (Rem. Code, Sec. 7598, App. A, p. 138). No part of the salary could be gar-

nisheed or levied upon for the husband's separate debt. *Coles v. McNamara,* 131 Wash. 691. The husband could not, by any possibility, convert the salary into his separate property nor use it for his separate purposes. The wife could dispose of one-half of the salary at any time by testamentary disposition. If the huband died before the salary was collected, the wife would take into possession one-half thereof; and if the wife died before the salary was collected, the wife's legatees or heirs would take one-half thereof. There was no ownership of the salary in the husband such as is required to justify a direct tax against him for more than one-half thereof.

Further, even if it be assumed that the salary would have been the subject of an excise tax, under the ruling in *Pollock v. Farmers Loan and Trust Co.,* Congress has made no attempt to levy any tax thereon, *based upon anything else than ownership.* Congress has not undertaken to levy an excise upon any exercise of *the right of management* or any other exercise of *single incidental rights,* such as was sustained by this Court in *Bromley v. McCaughn,* 280 U. S. 124.

Sec. 210 (a) of the Revenue Act of 1926 imposes a tax upon "the net income *of* every individual."

Sec. 213 (a) defines income and treats in one unified way, gains, profits and income derived from salaries, wages, professions, trades, businesses, commerce, or sales or dealings in property, and from interest, rents, dividends, securities and transactions of business. All of these are joined together and a tax is levied upon the income of each individual, based upon such aggregate income. Unless, under state law, items of such aggregate income are income *of* the individual taxed, the Revenue Act does not purport to tax them.

If it be conceded, for the sake of argument, that Congress might have levied some sort of an excise tax upon

the exercise by husbands of the power of management of the wife's property, such excise tax would have to be defined by some appropriate words, and the imposition would have to be *uniform throughout the United States.* Neither by the Revenue Act of 1926 nor by any other act, has Congress undertaken to levy any such excise. For the reason stated, it would be an unconstitutional construction of the Revenue Act of 1926 to hold that appellee Seaborn can be required to pay a tax and surtax based upon the united incomes which, under the laws of the State of Washington, belong to him and his wife.

To tax and surtax appellee upon this combined income would not only be violative of the constitutional provisions above mentioned, but would be so capricious and arbitrary as to constitute a taking of appellee's property without due process of law, and denying to him the equal protection of the law. The tax would fall within the principle of condemnation of such taxing laws announced by this court in *Nichols v. Coolidge,* 274 U. S. 531. It is not within the congressional power to lay a burden upon appellee because of property or income, the ownership of which, by state law, is in him and his wife. As this Court said in *Nichols v. Coolidge*:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character, and beyond recall."

The Court again said:

> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber v. Union P. R. Co.,* 240 U. S. 1; *Barclay v. Edwards,* 267 U. S. 442. See also *Knowlton v. Moore,* 178 U. S. 41, 77."

Like reasoning was applied in *Llewellyn v. Frick*, 268 U. S. 238.

It is to be constantly borne in mind, as shown on p. 38 of this brief, that it is impossible to treat the community income as if it were all the earnings of the husband. Community income is the result of a marital property status enacted by state law. It includes not only the earnings of the husband, but the earnings of the wife, recoveries for personal injuries incurred by the wife or by the husband, and the rents and profits of their joint accumulations. How absurd to say that Congress has, by the Revenue Act of 1926, determined to tax all of these items of income to the husband in states where community property laws exist (which laws deny the separate ownership of the husband), but to tax them separately to husbands and wives where other and dissimilar statutes and systems of property prevail, which other statutes and systems will be given full effect. Such a construction of the Act would make it as arbitrary, unequal and unfair as it is possible to imagine when applied to the different property systems in the different states.

In many of the so-called common law states, there are statutes expressly providing that such property items as the wife's earnings, her profits in trade or business, her professional salary, her professional fees and other items of gain (including income derived from the wife's recoveries for personal injuries) and the wife's share of the income from property held by the husband and wife in common, as well as the income of property transferred by the husband to the wife, constitute property of the wife alone. In Washington, the corresponding statutory provision is to pool such items accruing to the wife with like items accruing to the husband, and to call this joint pool community property. Both spouses equally enjoy that property and neither can use it for his or her separate purposes.

To call this joint property the sole property of the husband would be to create, by judicial decision, an artificial situation not based on statute or the common law.

The Sixteenth Amendment, the prior decisions of this Court, and the language of the Revenue Acts require the holding that, as to the income of accumulated real and personal property, the tax on the "net income of every individual" is a direct tax on the property producing the income, and must follow ownership. As to salaries, the tax being imposed in the same language and in the same clauses (with no distinction and no reference to a different kind of excise), it must have been the Congressional intent that ownership is the basis of the tax on salaries, as well. See the definition of "net income" in Sec. 212 (a) and Sec. 213 (a).

C.—IT IS THE DUTY OF THE COURT TO CONSTRUE ACTS OF CONGRESS IN SUCH A WAY AS TO AVOID GRAVE DOUBTS OF THEIR CONSTITUTIONALITY. THAT CONSTRUCTION SHOULD BE ADOPTED WHICH KEEPS AWAY FROM SERIOUS CONSTITUTIONAL DOUBTS.

The construction which has been placed upon the Revenue Acts by the Attorney General's opinion of 1920, and the regulations of the department and subsequent practice, obviously compels the conclusion that the Revenue Acts are open to the construction so given to them. The opposite construction now contended for by appellant must, to put the matter as favorably as possible to appellant, require the consideration by the Court of the serious constitutional questions hereinbefore stated.

Congress has not enacted, in any of the revenue acts, words which compel the construction which appellant now urges. Appellant's brief admits that there is no specific

reference in the statute to income from community property.

Under such circumstances, the recognized practical construction of the revenue acts should be followed, rather than to require the Court to consider and decide questions affecting interpretation of the constitution. This conclusion follows from the principles laid down in the following cases:

Blodgett v. Holden, 275 U. S. 142 (concurring opinion);

Reinecke v. Northern Trust Co., 278 U. S. 339;

United States ex rel. Atty. Gen. v. Delaware Co., 213 U. S. 366, 407;

United States v. Standard Brewery, 251 U. S. 210, 220;

United States v. Jin Fuey Moy, 241 U. S. 394, 401, 402;

Panama R. Co. v. Johnson, 264 U. S. 375, 390.

In *United States v. Delaware & Hudson Co.,* 213 U. S. 366, 407-408, the rule is stated as follows:

> "The rule plainly must mean that, where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which, such questions are avoided, our duty is to adopt the latter."

ARGUMENT POINT VIII. Answer to contentions asserted in appellant's brief.

A.—APPELLEE'S ANSWER TO APPELLANT'S POINT II, ASSERTING THAT, WHERE THE HUSBAND HAS CONTROL OVER AND RIGHT TO ENJOY THE ENTIRE COMMUNITY INCOME, HE IS REQUIRED TO INCLUDE IT IN HIS RETURN FOR FEDERAL INCOME TAX PURPOSES.

The first fallacy in the foregoing contention is the erroneous premise that, in the State of Washington, the husband can enjoy the entire community income, and ignoring the fact that his control is strictly limited by the statutes and decisions. Further, appellant overlooks the fact that the Federal Income Tax Acts have been so phrased as to apply distributively and particularly to every property system existing in any of the forty-eight states. There is no diversity of language in any of the revenue acts singling out community property for special legislation, though, of course, the existence of that system in seven states was at all times well known, both inside and outside of Congress.

It is important here to note that appellant's brief passes over, with the briefest possible reference in a footnote, the vitally important fact that Congress, in enacting the Revenue Acts of 1921 and 1924, expressly refused to include in these acts clauses that would single out community income and tax all of it to the spouse having management and control. This Congressional action, coupled with the executive administration and interpretation of the revenue acts applied to the community property states, is the most outstanding fact in the present record. We find no discussion of the point in appellant's brief. See this brief, pp. 61-64, and the joint brief filed by counsel for the taxpayers in the four pending cases. Also this brief, Appendix B, pp. 145-156.

Appellant apparently treats the opinion of the Attorney

General of 1921 (32 Op. Atty. Gen. 298, 435) upholding the right of divided returns as to community income as erroneous and as not correctly interpreting the local law. The Washington Supreme Court having for years, in case after case, declared that the ownership of community property is in both spouses equally, those holdings do not involve technicalities. Ownership cannot be passed over as a technicality if regard is to be had to *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429; *Eisner v. Macomber*, 252 U. S. 189, and *Bromley v. McCaughn*, 280 U. S. 124. We cannot concur in Appellant's statement that "nowhere in the Revenue Act of 1926, or in any previous Revenue Act, have there been set forth the proprietary rights which an individual must have in the particular income." All of the Revenue Acts use as the basis of the tax the language "the net income *of* every individual." All these acts were drawn and passed by Congress having in mind the settled law that taxes upon the income of real or personal property are direct taxes and must be based upon ownership. The proprietary rights therefore are defined in the acts as ownership and nothing else.

For further discussion of ownership as distinguished from management, see *infra*, pages 118-124.

B.—ANSWER TO APPELLANT'S CONTENTION THAT THE *ROBBINS* CASE AND *CORLISS V. BOWERS*, 281 U. S. 376, AND *LUCAS V. EARL*, 281 U. S. 111, AND OTHER CASES SUPPORT THE VIEW THAT MANAGEMENT AND CONTROL RATHER THAN OWNERSHIP ARE CONTEMPLATED BY THE REVENUE ACT OF 1926 AS THE BASIS OF TAXATION.

As to the *Robbins* case, we have already treated that case at some length in this brief, page 67, and we find nothing in it supporting Appellant's contention so far as concerns community incomes in the State of Washington.

The interest of the wife in community property in the State of Washington is not a mere formal right of ownership. The Supreme Court of Washington in the many cases cited and this Court in *Warburton v. White* (176 U. S. 484) make it clear that the wife's ownership is actual and real, both in its vested character and in its enjoyment, notwithstanding that for purposes of practical operation a larger share of the management as to a part of the property is given to the other spouse.

The implication that the husband in the State of Washington is "the person exercising or having the right to exercise substantially all of the rights of control and enjoyment" is without legal foundation.

(a) The husband in the State of Washington in the case of real estate cannot either sell or lease or mortgage it, or otherwise make it rent-producing (other than by a tenancy at will) without the joinder of his wife in the instrument (Rem. Code, Sec. 6893, Appendix A, p. 136) (See cases cited under Argument Point I of this brief, p. 22).

(b) As to personal property, the husband can invest it, sell it and change its form, but he cannot use it for the payment of his debts contracted before marriage, or in satisfaction of a tort committed by him before or after marriage unless connected with the carrying on of community business, or use it for the payment of his voluntary obligation (such as accommodation paper) not contracted in the carrying on of the community business.

(c) The husband cannot convert either community real estate or community personal property into anything but community property (since the common ownership would attach to the result of the sale or disposition, *Warburton v. White,* 176 U. S. 484, 497).

(d) The husband cannot dispose by will of more than one-half of the community property.

(e) The wife, despite all opposition of the husband, can

dispose by will or leave to her own children as her heirs one-half of the community property. Though the husband survive and be engaged in the management of an important business, the wife's half therein is expressly recognized by the Statute of Wills and Descents, and upon her death her half passes at once to her legatees or to her children (Rem. Code, Sec. 1342, Appendix A, p. 143).

(f) The husband's right of control and management is not a right of enjoyment in any sense, as his powers are limited to managing and controlling the property as if he held a power of attorney for that purpose (See authorities cited under Point I of this brief, pp. 23-28).

These considerations make it plain that it is very inapt language to attempt to express the husband's powers with reference to community property in Washington "as substantially all of the rights of control and enjoyment."

The plain fact is that the rights of control and enjoyment of community property in Washington are in both spouses, the husband being given by the statutes somewhat broader powers of control and management than the wife, but no greater powers of enjoyment. He can never make the community property his own.

Appellant's argument in endeavoring to show that the rights of the husband under the Washington statutes and decisions amount to substantial ownership, while asserting that the wife's rights (because coupled with a lesser control as to personal property) are not an actual property interest, attempts to set up an inconsistent rule. The applicable principle is plain when we consider that the actual ownership is in both spouses, both having rights of control, the wife's control being somewhat less than that of the husband. The complete management, control and enjoyment only arise by the exercise of the combined powers given to the husband and wife, neither alone being given unlimited control or enjoyment. The opinion of the At-

torney General of 1920 is thus shown to be the correct interpretation of the community status, and the adhesion to that opinion in subsequent practice is both lawful and just.

The case of *Corliss v. Bowers,* 281 U. S. 376, considers a situation *expressly provided for* by Congress in the Revenue Act. The statute provided that "where the grantor of a trust has, at any time during the taxable year, * * * the power to revest in himself title to any part of the *corpus* of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." This Court said: "There can be no doubt, either, that the statute purports to tax the plaintiff in this case."

The case was that of a grantor who made an instrument conditionally divesting himself of title to the *corpus* of the trust, with a condition of defeasance whereby he could retake the *corpus* at any time. The grantor's parting with the title was never complete, but was only conditional and the statute clearly directed that under such conditions the grantor should be subject to the tax. In the case of community property, there is no change of title, no condition or defeasance clause, and, as to that property, Congress has not attempted to make any such provision in the Revenue Acts as that considered in the *Corliss* case.

Appellant cites *Lucas v. Earl,* 281 U. S. 111. In that case, the husband claimed that by contract he had assigned to his wife certain salary and fees which later were taxed to him as his income. The opinion of this Court is clear that the taxing of salaries to those who earn them cannot be escaped "by anticipatory arrangements and contracts, however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it."

It is to be noted that the assignment on which the husband relied, in *Lucas v. Earl,* was really not a valid assignment of earnings (though the decision does not go on

that point) since the earnings did not arise from an employment or contract existing at the assignment date. See Williston Contracts (1920), Sec. 414. Of course, in this decision, the Court was not dealing with a situation where *by law* the title to an earned salary vests in one or more persons. Co-partnerships of attorneys often receive salaries. Such co-partnerships probably invariably receive fees. Where such salaries and fees belong by law to more than one person, they are, of course, invariably taxed to all the persons interested in proportion to their respective interests, without regard to the question of which partner actually did the earning. So, in the case of a salary earned by a minor which belongs to the father, the father is taxed. So it would also be in the case of a husband in a strictly common law state (if any state could be found preserving this unjust provision of the common law) where the wife's earnings are by law the property of her husband. In the *Lucas* decision, the Court considered only the facts before it and did not undertake to say that, where the law fixes the ownership of a salary (especially a law in force before the statute was enacted or the salary earned), the salary is to be taxed to someone not the owner.

Lucas v. Earl is an authority for the holding that attempts to evade the federal taxation statutes by private contracts and arrangements must fail. That case is *not* an authority for the contention that *state property systems,* established and maintained many years before the adoption of the Sixteenth Amendment, *are not controlling* on all questions of property and ownership—that state laws intended to fix and prescribe property rights, though much older than that Amendment and the Revenue Acts, *are on no higher plane than evasive private contracts.*

The distinction between an assignment of salary by contract and the vesting of the title thereto by reason of the law and the family relationship, is similar to the hold-

ing of this Court in *Buchser v. Buchser,* 231 U. S. 157, where the Court said:

> "The special family relations thus created are not like contracts with third persons impliedly forbidden by the Act." (The Public Land Acts.)

As we show elsewhere in this brief (p. 129), in assessing income taxes, the lawfulness of a partnership between husband and wife (in states where such partnerships are authorized by law) is recognized by the Treasury Department, and *full recognition of such partnerships is given in the division of income* between husband and wife for income tax purposes.

We agree with the statement in appellant's brief (p. 16) that "the *Robbins* case has measured the rights of dominion and enjoyment by *exceedingly practical tests.*" Those tests are enumerated at pp. 67-71 of this brief, and, measured by those tests, the rule of the *Robbins* case cannot possibly be applied to the taxpayers in the State of Washington, even if the taxpayers of Washington and the six other community property states did not have also in their favor the departmental construction and the approval of that construction by Congress.

C.—SECTION 223 OF THE REVENUE ACT OF 1926, GIVING THE HUSBAND AND WIFE THE OPTION OF FILING A JOINT RETURN OR SEPARATE INDIVIDUAL RETURNS, IS NOT TO BE IGNORED.

Section 223 gives the husband and wife the option of filing a joint return or of filing separate returns. This is an option for the benefit of the married taxpayers of which such taxpayers may avail themselves or not as they prefer.

It is undoubtedly in view of the fact that the laws in the several states regulating the property rights of husbands and wives are exceedingly multitudinous and varied, that Congress enacted this permissive section 223 which

can be utilized by husbands and wives in every state at their option.

D.—APPELLANT'S DEFINITION (PAGE 16) AS TO WHAT CONSTITUTES OWNERSHIP, IF ACCEPTED AS TRUE, WOULD WHOLLY DEFEAT APPELLANT'S CONTENTION THAT THE HUSBAND IS THE SOLE OWNER OF THE ENTIRE COMMUNITY PROPERTY AND INCOME.

It is asserted in appellant's brief (page 16) that "it is settled that the rights of ownership which the person taxed must be able to exercise are substantial rights, and among such substantial rights are the rights of disposing of the income or the source of the income." This idea is expressed for the purpose of drawing the inference that the wife is not an owner, but if adopted it would lead equally to the inference that the husband is not an owner.

If the assertion be taken as true, it is a complete answer to Appellant's entire contention in this case. As we have pointed out (pages 21-32 of this brief), the husband's rights as to community property and income in the State of Washington do not include "the right of disposing of the income or the source of the income" (in the sense of making it his own), and do not include the right of using the income or having it used *for his own benefit.*

There is no method under the law of the State of Washington by which the husband can utilize the community income for his own benefit. The same is true of the source of the income. While he can change the form of the community personal property into other community property, he cannot in any manner make it his own. As to real estate, he can do practically nothing to derive a revenue from it or to convey it without the wife's joinder. He cannot utilize any community property or income to pay his personal debts. He cannot give it away. He cannot use it for his own benefit. As to wills and descent, he can do

only what his wife can do, namely, bestow by will or permit to pass by descent one-half thereof. As to real estate, he cannot sell it or make it substantially productive by a term lease without his wife's joinder. As to personal property, his rights are limited repeatedly by Washington decisions, affirmed by this Court. The actual ownership, as well as the rights of enjoyment, is in both spouses.

> *Bortle v. Osborne* (decided by the Supreme Court of Washington February 24, 1930. Unofficially reported in 285 Pacific Reporter 425).

The community property in the State of Washington has an owner or owners. State statutes and decisions say that the owners are husband and wife. Each spouse owns one-half and there are certain restrictions on alienation applicable to each. If the ownership contemplated by the Revenue Act is to be defined as asserted by appellant, it follows that appellee's view is manifestly correct, namely, that there is a joint ownership of that property by two persons. The husband alone plainly fails to qualify as owner of the entire community property or income under appellant's definition.

E.—ANSWER TO APPELLANT'S PROPOSITION THAT A LIMITED RIGHT TO PREVENT A PARTICULAR DISPOSITION OF COMMUNITY INCOME OR PROPERTY BY THE HUSBAND WOULD NOT BE IMPORTANT FOR THE REASON THAT SIMILAR RIGHTS ARE ENJOYED BY PERSONS IN STATES WHICH DO NOT HAVE A COMMUNITY PROPERTY SYSTEM.

Appellant cites the Utah statutes providing that no assignment of a husband's wages is valid unless assented to by the wife in writing. The difference between the Utah situation and the Washington situation is that, in Washington, *in addition to the statutory clause mentioned by appellant*, the wife has an actual vested interest in the

husband's wages assured by positive statutes declaring her the owner of half thereof, and by the decisions construing those statutes. In Washington, the husband cannot use the wages to pay his prenuptial debt or his postnuptial debt contracted by him for accommodation of others or to pay a judgment against him for his private tort, nor can he in any way dispose of these wages except for the benefit of himself and his wife as a community.

Coles v. McNamara, 131 Wash. 691.

Further, if the wife dies, her legatees or children receive as their own one-half of the wages if uncollected, or one-half of the proceeds thereof if collected and subsisting in any form. The husband's rights are not substantially greater. The reference, therefore, to the wife's interest in community property in Washington as a mere restriction on alienation is not pertinent.

The wife and the husband have equal *property rights* in the community property, with restrictions *applicable to both* as to alienation. These restrictions (the Washington cases hold) do not affect the fact that the title ownership and right of enjoyment is in *both spouses,* in the wife as much as in the husband.

F.—ANSWER TO APPELLANT'S CONTENTION THAT IT IS NOT IMPORTANT THAT THE WIFE CAN PREVENT THE HUSBAND FROM DISPOSING OF MORE THAN ONE-HALF OF THE PROPERTY BY WILL.

Under this head, appellant cites an Oklahoma statute whereby the husband is prevented from bequeathing away from his wife a certain portion of *his* estate. Appellant also cites a Minnesota Statute of Descent, providing that a wife shall inherit a certain interest in the husband's real estate the conveyance of which she has not consented to in writing. Appellant does not note in this connection the im-

portant fact that in Washington all the property now in question is by statute made *the common property of both spouses* and the wife herself can will away or leave to her children (as *her half* of the community property) the half that the husband does not have power to dispose of. The community property system in force in Washington gives her a present ownership, not merely a provision effective

INCOME.

How far the husband's limited right of management and control in the State of Washington is from "the actual command" of the property and income appears from what has been said. When a man cannot use an income for his own benefit, or allow his creditors to take it to pay his own obligations, or convert it into his own property, or exclude

NOTE TO PAGE 101

So far as we can find, no court has ever said or intimated that *the community property system* (often discussed by the courts) is to be confused with *common-law* systems wherein there are statutory restrictions on the power of the husband to devise or convey *his own property* or with provisions by which a wife may bar her claim for dower or its equivalent in *her husband's* estate.

Appellant's discussion under this head relates to states where the husband is the *acknowledged sole owner* of the property concerned. Such considerations are wholly inapplicable to the case of a marital partnership where, as a result of the marriage relation, the law vests in both husband and wife the accumulations that both or either of them make after marriage as a result of the efforts of either or both of them, making the same common property of the two.

portant fact that in Washington all the property now in question is by statute made *the common property of both spouses* and the wife herself can will away or leave to her children (as *her half* of the community property) the half that the husband does not have power to dispose of. The community property system in force in Washington gives her a present ownership, not merely a provision effective at the husband's death.

Appellant's argument overlooks the fact that both in Oklahoma and in Minnesota (and the same may be said of other states whose statutes contain similar provisions) these statutes merely insure to the wife a certain inherited interest in the *husband's estate if she survives him.* Such statutory provisions have nothing to do with the situation where the wife *owns a present half interest* in the common property and if she dies first or whenever she dies, *her* legatees or *her* children become the owners of one-half the property regardless of what the husband may do,—and where, if the husband dies first, the wife retains one-half of all the property, not by descent or by will, *but by continuation of the title which she had during coverture.*

See note attached.

G.—ANSWER TO APPELLANT'S CONTENTION THAT THE PRIME CONSIDERATION SHOULD NOT BE REFINEMENTS OF TITLE, BUT ACTUAL COMMAND OF THE INCOME.

How far the husband's limited right of management and control in the State of Washington is from "the actual command" of the property and income appears from what has been said. When a man cannot use an income for his own benefit, or allow his creditors to take it to pay his own obligations, or convert it into his own property, or exclude

from joint interest in it or its proceeds his marital partner, and possesses only the same right of disposition by will or by inheritance as his marital partner possesses, the situation is far short of "actual command." To find actual command we must combine the rights and powers of both spouses. The actual command cannot be found in either spouse alone.

Appellant discusses that section of the Washington statute giving the husband the power of disposition of *community personal property* as if the word "disposition" were not limited by the context of the section and by the uniform holdings of the Supreme Court to mean a disposition for the benefit of the community or a mere change of form into *other community property.* "Disposition" may have a broad or a narrow meaning. In Washington, it does not mean that the husband can utilize community personal property in any way for his own benefit. Whatever change of form the property undergoes by his "disposition," the resulting product is community property owned by both spouses.

H.—ANSWER TO APPELLANT'S CONTENTION THAT PERMISSION TO DIVIDE THE COMMUNITY INCOME IN THE STATE OF WASHINGTON BETWEEN HUSBAND AND WIFE WOULD BE UNFAIR AS TO TAXPAYERS IN THE OTHER STATES NOT HAVING THE COMMUNITY SYSTEM.

There is no unfairness in fact in the present practice of divided returns established in 1920 as the result of the Attorney General's opinion. In some instances there will be found an advantage to the Washington taxpayers and in many other cases there will be found a disadvantage. On the whole it is hard to say where the preponderance of advantage lies. If it could be demonstrated that any advantage results one way or the other, that would be no reason for deviation from the law.

If it were a fact that the community property system, by reason of establishing a partnership between husband and wife, resulted in a saving to the taxpayers concerned, it would be no more than the accidental saving which may result in any state having any system of law which that state may see fit to adopt regulating property titles or the property rights resulting from the marriage contract.

However, if there were any basis for the suggested unfairness, the only way to meet it would be by a Federal Revenue Act *which would make specific provision for taxing the income of husbands and wives with the same specified separation of the income of each spouse applicable in all the states.* Whether such a Federal Act would be constitutional in view of the Sixteenth Amendment and the holdings of this court in the case of *Pollock v. Farmers Loan & Trust Co.* and such subsequent cases, it is unnecessary now to determine.

But the unfairness that would result from the adoption by this Court of the construction of the Revenue Act now urged by Appellant is manifest and overwhelming.

It is to be remembered that appellant is not now urging that *the income of the wife be taxed separately* from the income of the husband, either insofar *as their several earnings are concerned* or insofar *as the earnings of their joint accumulations are concerned.* Appellant's contention is that the laws of the State of Washington be accepted up to the point of pooling the earnings and accumulations of both spouses after marriage, and then that these laws be departed from by the bold act of taxing this entire community income to the husband. In none of the so-called common law states (insofar as known) is the income of the wife added to the income of the husband and surtaxed accordingly. All of these states presumably have changed the barbarous principle of the common law by which the husband becomes the owner of his wife's earnings.

So far as known, in all of those states the wife's earn-

ings and the income arising from accumulations thereof (instead of being assessed to the husband for Federal taxation) are reported and taxed separately. As to such property accumulations as the husband transfers to his wife (to insure her a fund producing an income) such income is taxed only to the wife. In the State of Washington, by common consent, in lieu of a voluntary transfer by husband to wife, the law creates in her for her protection a one-half interest in the community property. Is this interest in the wife less entitled to recognition than a property interest transferred voluntarily by her husband in some so-called common law state?

Further, recoveries for personal injuries suffered by the wife, equally with recoveries for personal injuries suffered by the husband, are community property in Washington. Such recoveries are frequent, as life becomes more complicated and subject to risks. A substantial part of the accumulated property of husbands and wives is often the result of a personal injury to the wife. In the states having a system whereby the wife's property is recognized as being entirely separate from that of the husband, her recoveries for personal injuries are her own, and income based on accumulations thereof is taxed by Federal law to her alone.

In other words, the argument of unfairness must lead to the reverse of Appellant's contention. That contention would utilize the community property laws of Washington and six other states, to create an artificial status not based on any statute, state or federal. It would penalize husband and wife by recognizing and enforcing the community property law so far as it combines the earnings and personal injury recoveries of the wife with the earnings and personal injury recoveries of the husband, and places in one common fund the income of the wife's share along with the income of the husband's share of all marital accumulations. Having recognized the community property law so far as its operations would be adverse to husbands

and wives in Washington, Appellant's contention would then have the combined income of all the accumulations taxed and surtaxed to the husband alone. This artificial method of taxation would refuse to recognize the ownership to be where the state law puts it, namely, "in the two spouses jointly," although utilizing the state law to effect the joining of the incomes. Appellant's contention, so far from accomplishing uniformity, would make uniformity impossible as between the systems prevailing in the various states, since in all the so-called common law states, *full* effect is given to the state statutes.

Wives in Washington engage in trade and business. They are (with or without their husbands' actual cooperation) proprietors of shops, artists, teachers, clerks, physicians, lawyers, librarians and what-not. By the law of the state of their citizenship, their earnings and gains in all capacities are pooled with the earnings and gains of their husbands, and the joint result is community or common property. It would be the height of arbitrariness to treat all of this joint pool of their gains as the property of the husband, and to tax and surtax him accordingly. Such a course would not follow the law of any jurisdiction, but would *by arbitrary fiat* create, by judicial decision, a new property system.

Appellant's brief (p. 17) says:

> "If married persons in the State of Washington, because of their community of interest in property which either may acquire during wedlock, are taxed upon their incomes *at lower rates* than married people in other states who enjoy substantially the same rights and powers with respect to the control and disposition of income, the purpose of the law will be defeated."

The Revenue Act prevents, in express terms, any discrimination between the citizens of different states by taxing at fixed rates "the net income *of* every individual," and has adopted, from necessity, the law of each state as

defining what is the income of each individual, and looks to state law to answer the question, "To whom does the income belong?"

There is no possibility that individuals in Washington will be taxed at lower rates than those in "common law" states if the present practice of adhering to individual incomes be followed. On the other hand, as we show on p. 38 of this brief, the adoption of appellant's contention for taxing and surtaxing all of the community income to only one of the spouses (which income represents the joint earnings and accumulations of the spouses), would result in a most unjust and prejudicial raising of the rate against taxpayers in the community property states. The purpose of the revenue law will not be defeated by taking the law of each state as final in the ascertainment of the ownership of incomes. That is what both the Sixteenth Amendment and the Revenue Acts contemplate.

I.—ANSWER TO APPELLANT'S REVIEW OF WASHINGTON DECISIONS IN SUPPORT OF THE CONTENTION THAT THE COMMUNITY OF HUSBAND AND WIFE IN THE STATE OF WASHINGTON IS AN "ENTITY."

There are numerous decisions in Washington where the word "entity" has been used in connection with the community property system. In many cases in Washington and elsewhere, partnerships are often spoken of as "entities." It is a convenient term. In the marshaling of assets, and in separating joint from several liabilities, some such term is almost necessary in order to maintain a distinction between individual rights and interests and joint rights and interests.

The use of this language does not support appellant's inference that the Washington statutes have created a juristic person in the nature of a corporation or other-

wise. In Appendix A, pages 135-143, there are set forth the Washington statutes establishing the community system. These statutes do not contain the word "community" as a noun, but only as an adjective, describing the "community property" or "the common property." At pages 30-31 of this brief, we have quoted at length from the latest decision of the Supreme Court of Washington on this point, namely, *Bortle v. Osborne* (February 24, 1930, unofficially reported in 285 Pacific Reporter, p. 425). Undoubtedly, this decision has been overlooked by counsel for appellant. We submit that it disposes entirely of appellant's contention as to the nature of the "entity." This "entity" is a relation, not a person. The husband and wife, as owners of the community property, are viewed in a certain relation, which for convenience is called the "community." The same treatment is accorded to a partnership without losing sight of the fact that the individuals in the partnership own the assets and are not merged into a statutory being.

It is to be noted that, when the husband sues the wife, or vice versa, over disputes concerning community questions, each sues the other *as an individual.* It is not the so-called "entity" or community that is a party to the case, either plaintiff or defendant.

Mattinson v. Mattinson, 128 Wash. 328, is cited by appellant as holding that the wife as an individual may sue the community. A reference to the case will show that the wife as an individual sued the husband as an individual, and the rights of the community were adjusted in that suit. The only parties to the suit were the plaintiff wife and defendant husband.

As declared in *Bortle v. Osborne* (285 Pacific Reporter 425, February, 1930) the community property is owned by husband and wife, each owning an undivided one-half interest therein, with statutory provisions regulating the management and alienation of that property, real and

personal, in which both spouses take part, the powers of each being defined.

Appellant's brief, at p. 23, cites certain sections of McKay on Community Property, wherein that author lays down the rule flatly that the Supreme Court of Washington holds that the community is a juristic entity. It is evident that that author has misunderstood the use of the word "entity" as used by the Washington Supreme Court in several cases. *Bortle v. Osborne* is the latest case and holds as stated.

McKay's discussion of ownership of community property in the sections cited by appellant (Secs. 1172, 1183, 1184) arrives at no definite conclusion except that the community system is *sui generis*. Mr. McKay comes to the further conclusion in Sec. 1184:

> "Those who accept the theory that the husband is owner during marriage are obliged to admit that he is not owner of community property in the sense that he owns his separate property. The wife has rights of some sort, either in the property, which makes of her a sort of *co-owner*, or else a right to have her moiety, which creates a form of equitable right."

In Section 1186, Mr. McKay arrives at the sound conclusion that "the law, rather than any person's theory, should control." As a part of the law, and as defining its authoritative construction, of course, the decisions of the highest court of the state are controlling.

J.—ANSWER TO APPELLANT'S CONTENTION THAT IN THE STATE OF WASHINGTON (A) THE HUSBAND IS GIVEN COMPLETE AND EXCLUSIVE POWER TO DISPOSE OF COMMUNITY PERSONAL PROPERTY, TO BIND THE COMMUNITY BY CONTRACTS CONCERNING IT AND TO SUE AND BE SUED IN REGARD TO IT: (B) THAT THE HUSBAND HAS THE MANAGEMENT AND CONTROL OF THE COMMUNITY REAL ESTATE AND MAY BIND THE COMMUNITY BY CERTAIN CONTRACTS RELATING TO IT: (C) THAT THE COMMUNITY PROPERTY IS LIABLE FOR ALL DEBTS INCURRED BY THE HUSBAND AND ALL TORTS COMMITTED BY HIM IN THE PROSECUTION OF COMMUNITY AFFAIRS.

This argument has been to some extent anticipated in preceding pages.

It is, of course, conceded that, in any community property system, the husband has certain statutory powers of management and control. In Washington the wife also has certain statutory powers of management and control, especially as to real estate. The courts naturally recognize and apply these statutory provisions. It is not necessary to discuss at length the Washington cases cited under these heads in appellant's brief. None of these cases controvert the Washington cases we have cited in this brief declaring the ownership by the wife of what the statute (Sec. 1342) calls "her one-half of the community property." In fact, the decisions cited by appellant support our contention. We refer to a few of them:

Ostheller v. Spokane & Inland Empire R. R. Co., 107 Wash. 678, holds that, where a husband and wife are killed in the same accident, the recoveries for both deaths constitute community property, and the contributory negligence of the husband, as the manager of the community

personalty, is held to defeat recovery on the wife's behalf.

Mattinson v. Mattinson, 128 Wash. 328, holds that, where the husband borrows money from the wife, he and the community property are liable to the same extent as if borrowed from a third party, and the wife is authorized to bring an action against the husband to secure payment accordingly.

A number of the cases cited are to the effect that, where the husband holds, as community property, stock in a corporation, his transactions in aid of that corporation constitute community obligations.

Assignments by the husband alone of personal property and personal choses in action are held valid without the signature or assent of the wife. Of course, the proceeds of such assignments remain community property. The interest of a lessee in a lease is held to be a chattel and therefore personal property which the husband may assign with like result as to proceeds.

Torts committed by a husband while engaged in the management of community property are held to be enforcible against the community property. The contrary is held as to torts committed by the husband when not acting with respect to the community property.

Debts contracted by the husband during the marriage are *prima facie* community debts, but the contrary may be shown and the wife is entitled to her day in court on the hearing of that question.

In *re Finn's Estate,* 106 Wash. 137 (cited by appellant), the Court laid down the following rule:

> "Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof; the presumption always being that it is

community property, but this presumption may be rebutted by proof."

Appellant cites *Daniel v. Daniel*, 106 Wash. 659, as holding there need be no accounting of community property as between husband and wife. Generally under the Washington law there is no accounting as between husband and wife, except in the case of fraud, wrong doing, dissipation, over-reaching, or some other ground for equitable interference, in any of which cases the Court will protect the wife's interest. In *Daniel v. Daniel*, the wife was dead, and her daughter brought suit for certain property, alleging that it was community property and that, by the wife's death, the daughter succeeded to her mother's interest. There was an issue of fraud in the case as to whether *after the wife's death the daughter had been induced by fraud to release her claim to the property.* The Court treated and disposed of that fraud issue. That issue related wholly to the reported release and had nothing to do with the transactions that occurred on the part of the husband or wife during the existence of the marriage relation. There being no evidence of wrong on the husband's part during the marriage, the Court held that the daughter succeeded only to the rights of the wife who, in the case stated, had no right to an accounting during the marriage relation. This was plainly the correct holding in view of the fact there was no charge of fraud, overreaching or other ground for equitable interference as against the husband.

In *Normile v. Denison*, 109 Wash. 205, cited by appellant, the lower court had sustained a demurrer to a complaint which alleged that, at the time of making a property settlement between husband and wife, certain property was fraudulently concealed by the husband. The Supreme Court (reversing the judgment below which had dismissed the case) declared that, when a husband attempts to defraud the wife of the community property, the wife can obtain redress.

In *Barkley v. American Savings Bank,* 61 Wash. 415, cited by appellant, the Court holds that, upon the granting of a divorce without making any disposition of the community property, the spouses become tenants in common thereof (a continuation of their former title), citing in support of the holding the earlier case of *Ambrose v. Moore,* 46 Wash. 463, and other cases where the continuation of the former title of the husband and wife is recognized, the joint ownership as community property becoming, by dissolution of the community, a tenancy in common.

Appellant recognizes that the community property is not liable for the separate debts of the husband, whether contracted before or after marriage, nor for torts committed by the husband, not committed in the prosecution of community affairs.

K.—ANSWER TO APPELLANT'S STATEMENT THAT THE WIFE CANNOT, WITHOUT HER HUSBAND'S CONSENT, MAKE ANY VALID CONTRACT WITH REFERENCE TO COMMUNITY PERSONALTY OR COMMUNITY REAL ESTATE, AND CANNOT RESTRAIN HER HUSBAND IF HE MISMANAGES THE COMMUNITY PROPERTY, OR REMOVE ANY PART OF IT FROM THE HUSBAND'S CONTROL WITHOUT SECURING A DIVORCE.

(1) Under the Washington law, the husband has in general the management and control of the community personal property and certain powers of management over the community real estate, his powers in both cases being limited by statute. The plain purpose and intent of the statute is to provide a method by which dead-locks shall be avoided and the community system be carried on to the advantage of both spouses.

Whenever there is ground for interference of the courts

to protect the wife's interest, the courts of Washington have never failed to protect her.

Marston v. Rue, 92 Wash. 129 (cited by appellant) recognizes that, when the occasion arises, the wife's interest will be protected, the Court saying, "the community personal property *is as much the wife's as the husband's.*"

Appellant cites *Hynes v. Colman Dock Co.,* 108 Wash. 642, as holding that the wife may not sue for personal injuries to herself where the husband refuses to join as a party. Appellant overlooks the fact that this holding is expressly based by the Court on the ground that (p. 646) "in the instant case we find no allegation in the complaint of a wilful *abandonment* or *dissipation* or *waste* of the community personalty, nor of the husband's *failure to exercise his honest judgment* in refusing to institute the action," a plain declaration that the Court stands ready to protect the wife in case of the existence of any of these grounds.

Appellant cites *Wampler v. Beinert,* 125 Wash. 494, a case which is in fact in appellee's favor, holding that the wife's interest in the community personal property is protected by the courts where the husband neglects or refuses to act. The Court quotes from *Stewart v. Bank of Endicott,* 82 Wash. 106, as follows:

> "The purpose of Sec. 5917 is to give the management and control of the community personal property to the husband *for the purpose of facilitating the business of the community.* He can neither beggar his family nor use the community personal property to gratify a caprice to *thwart the law* or for his own personal aggrandizement."

The Court also quotes from *Olive Co. v. Meek,* 103 Wash. 467, as follows:

> "The doctrine of *respondeat superior* cannot be applied to acts of the husband, when such acts are without the scope of his authority. *Day v. Henry,* 81 Wash. 61. To hold otherwise would in effect *nullify*

> *the community property law. There is no distinction between vested rights in either community real or personal property except that the husband is made the manager of the community personal property for the community.*"

The Court also quotes from *Marston v. Rue,* 92 Wash. 129, as follows:

> "That there is *in the wife inherent power* under our law to act in a serious absence of the husband is plain."

The Court then quotes from *Dority v. Dority,* 96 Tex. 215, and *Hall v. Johns,* 17 Idaho, 224, (the quotations are given at page 42 of this brief) and approves and adopts the rule prevailing in Texas whereby wives are given ample remedies by suits against the husband, in case of violation of community rights.

The Washington court also holds in this case (*Wampler v. Beinert,* 125 Wash. 494) that, where the husband settled and released a claim for personal injuries to the wife, the release would be held void at the suit of the wife, if made in fraud of her rights or not in good faith.

In *Parker v. Parker,* 121 Wash. 24 (cited by appellant) the Court said:

> "The law which gives the husband the management and control of the community personal property does not give him the right to make substantial gifts thereof against the consent of the wife. As was said in *Schramm v. Steele,* 97 Wash. 309, 'the statute intends no more than *to make him a statutory agent of the community*'."

(2) Appellant's contention that the wife cannot restrain her husband if he mismanages the community property is not borne out by any cases cited. It is not supported by any case found in the Washington Reports.

Floding v. Denholm, 40 Wash. 463 (cited by appellant), holds that, when the husband contracts a community debt, it can be enforced against the community property, al-

though it is the result of an investment which was made against the protest of the wife. A difference of judgment, or an error of judgment, is a very different thing from bad faith or wrong doing.

Another case cited by appellant to sustain the proposition is *Bellingham Motors Corporation v. Lindberg*, 126 Wash. 684, where notes given by the husband for the purchase of an auto truck were held to be presumptively a community debt although the wife protested against the purchase.

The cases cited, therefore, do not sustain the appellant's proposition as asserted.

We have cited on pp. 40-43 also 21-32 of this brief other cases upholding the right of the wife to relief in case of wrong doing by the husband. Cases involving such a situation have been few. The Washington Court has not been often called upon to protect the wife against wrongful acts of the husband. The important fact is that *no Washington case can be found where relief to the wife was refused against the husband as to community property in the case of fraud, wrong doing, over-reaching, dissipation, or abandonment.*

Of course, the wife cannot repeal or ignore the statute which gives her husband certain powers of management. Neither can the husband repeal or ignore the statutory provisions giving the wife the right to participate in the control and management of real estate, and in certain cases in the control and management of personal property. Both spouses are bound by the statutory provisions. Case after case has been decided by the Washington Court annulling the husband's attempt to go beyond the statutory powers of management conferred on him "for the purpose of facilitating the business of the community." (Language of the Court in *Stewart v. Bank of Endicott*, 82 Wash. 106).

The fact that the wife cannot prevent the exercise of the husband's statutory powers, when exercised in good

faith, amounts to no more than the fact that the husband cannot prevent the exercise by the wife of her statutory powers. Both of these powers operating together constitute the complete power of dominion, control and enjoyment. Relief has frequently been granted by the courts against attempts to subject community property to liability when the non-community character of the liability contracted by the husband appears. When the evidence shows the liability to be the separate liability of the husband, the presumption that it has a community character is at an end. See this brief, pp. 28-30.

We submit that appellant has wholly failed in the endeavor to controvert *the fundamental proposition* laid down by this Court in *Arnett v. Reade,* 220 U. S. 311, that "*It is conceded* by the court below, *and everywhere, we believe,* that *in one way or another she* (*the wife*) *has a remedy* for an alienation made in fraud of her by her husband."

It is evident that there is no real support for the contention that the strong and emphatic provisions of the Washington system (which the Attorney General has said in 32 Op. Attys. Gen. 435 "more fully recognize" the wife's property rights than the system of any other state) are mere academic pleasantries—that the courts of Washington recognize the husband as having the rights of an owner—that those courts hold that the fruits of the wife's labor and her contributions to the common fund *belong to the husband,* and that she can have no judicial relief when her statutory rights and interests are violated. The Washington courts, as we have shown, constantly hold to the contrary.

In Appellant's statement at p. 38, that the wife "cannot interfere with his contracts or bind the community by her own contracts except as to family necessities," appellant overlooks the fact that it takes the joint contract of ***both husband and wife*** to sell, encumber or lease the community real estate and that, without the wife's contract in

this regard, such real estate must remain entirely unproductive and unsold and unencumbered except that it may be let by a mere tenancy at will. Appellant likewise overlooks the important fact that, as to both real estate and personal property, the Court stands ready to protect the wife's interest whenever the husband attempts to convert any community property to his separate use or enjoyment, or otherwise transcends the statutory powers which both the Washington Court and this Court (in *Warburton v. White,* 176 U. S. 484) hold are vested in him only to facilitate and carry on the business of the community.

Appellant's brief, at pp. 37-38, refers to the fact that, under the divorce law of Washington, the Court in pronouncing a divorce disposes of both the separate property of the spouses and of the community property. It is hard to see how this leads to appellant's inference concerning the ownership of community property. The separate property of the wife, the separate property of the husband, and their community property are *all* made subject to the equitable disposition of the Court. The equitable disposition of all the property depends upon the question of the fault or grievance leading up to the divorce, and the other circumstances. No Washington case is cited, and we are sure none can be cited which, in dividing *all* the property of both spouses, has ever said or intimated that the spouses are not equal owners of the community property. *Ambrose v. Moore,* 46 Wash. 463, is to the contrary.

It should be further observed that in contracts for conveying, leasing or otherwise encumbering or disposing of community real property, both spouses stand exactly on an equal footing.

The many cases that we have cited show clearly that the Washington Court has constantly obeyed the mandate of the community property statute, Rem. Code Sec. 6898, directing that the provisions of the community property law and all proceedings under it "shall be liberally

construed with a view to effect its object." These cases are all overlooked by Appellant in the statement (Brief p. 32) to the effect that the Washington Court "has shown no disposition to construe these provisions liberally in order to give the wife positive powers of control."

In the case of the Seaborn income now under consideration, $7,000.92 profit on the sale of real estate known as "Lake Washington Shorelands" (R. 27) was necessarily the result of a contract of sale in which the wife was as much a principal as the husband. How much of the Seaborns' accumulated property had accrued from transactions as to realty and personalty in which the wife took part as principal and active participant does not appear. No effort has been made to trace the origin of that accumulated property, it being taken for granted that its status is sufficiently established by the court finding that it was accumulated by Seaborn and his wife after marriage and is their community property (R. 20—Par. G).

L.—ANSWER TO APPELLANT'S FURTHER CONTENTIONS REGARDING ALLEGED "COMMAND" OR "DOMINION" OVER THE COMMUNITY PROPERTY IN WASHINGTON AND THE CLAIMED INTERPRETATION OF THE REVENUE ACTS APPLICABLE THERETO.

In appellant's brief (p. 36) it is attempted to boil down the community property system of Washington to the simple statement that "The only important restriction on his powers is that he cannot give away a substantial amount of community property or fraudulently sequester

it." In fact, the important point in the Washington system is that the husband cannot make community property his own in any manner whatever. He not only cannot fraudulently sequester it, but he cannot sequester it at all, in the sense of depriving the wife of her one-half interest therein. Whatever he does with the community property under his statutory powers, the resulting proceeds of his disposition are community property. Aside from the fact that, as to real estate his powers are practically impotent without the wife's joinder, the husband can do nothing with either class of property to despoil the wife of her interest. The Washington statutes were not copied from those of California, but, on the contrary, have gone further than the laws of any other community property state in recognizing the full and equal interest of the wife (32 Op. Attys. Gen. 435).

The laws of Washington give statutory and judicial recognition of the fact that the wife, in modern life, produces the accumulations of the spouses fully as much as the husband, and is, in fact the equal acquirer of the community property. The result that these laws contemplate is not a technicality, but a beneficial vested ownership. The limitations on the practical rights of the husband are such that, under no definition, can the husband be considered the sole owner of the community property. When one can neither use property for his own benefit, nor use it for the payment of his debts, nor allow his creditors to levy upon it, nor will it away, he is not the sole owner.

There can be no foundation for the idea that the husband in the State of Washington, has "dominion" or "command" over the community property. Neither the word "dominion" nor the word "command" occurs in the Washington statutes. We have not been able to find either word in any Washington decision used with reference to the husband's limited powers of control and management. To apply either word to the husband's

powers in Washington is to legislate directly against the Washington statutes and decisions.

As we have shown, appellant's contention that the relationship existing between husband and wife under the laws of Washington results in the creation of a juristic being, is directly denied by the decisions of the Washington Supreme Court in *Bortle v. Osborne,* 285 Pac. 425 (February, 1930), and the title, ownership and right of enjoyment are by this and other decisions held to be equal in both spouses. The Washington cases cited by appellant, holding that the husband can dispose of personal property and of chattels real (such as leases, contracts, and the like, which are held to be personal property) in the prosecution of the affairs of the community, without consent of the wife, must be read with the recollection that the proceeds of all of such transactions remain community property.

Appellant's statement, that no decision can be found which holds that the wife may force the husband to give her a share in the community property, if true, would be of no more consequence than the fact that the husband cannot force the wife to give up to him her one-half or any other share of the community property. He may exercise (in the case of real estate and in other instances jointly with the wife) certain powers. Further, the wife may, in fact, without seeking divorce, compel the husband to give her a share of the community property.

Kimble v. Kimble, 17 Wash. 75;

State ex rel. Lloyd v. Superior Court, 55 Wash. 347.

See other cases cited on pp. 22-32 of this brief.

The Circuit Court of Appeals, of the Ninth Circuit, which has had occasion to become thoroughly familiar with the Washington statutes and decisions, said in its certificate in this case (Cert. 2):

"It is the established rule of decision in the highest court of the State of Washington that the wife,

> during the life of the husband, as well as upon a dissolution of the marriage, has a vested and definite interest and title in the community property, real and personal, equal in all respects to the interest and title of the husband therein. *Rucker v. Blair,* 32 Fed. (2d) 222. It is likewise the established rule of decision in that state that the power given to the husband of management and control of the community personal property, is a naked power in trust for the community. It is not a power coupled with an interest, and gives the husband no proprietary right or interest in the one-half of the community property, real or personal, which belongs to the wife. It differs in no respect from an agency created by a general power of attorney or other contract of agency."

Appellant attempts to avoid this highly authoritative digest of the Washington community property system by saying that, under the general law of agency, the principal may revoke the agency. It can hardly be doubted, however, that a statute may create the same kind of agency which the parties might create by contract, and make the agency irrevocable within the statutory limitations.

Appellant says that the husband does not act "as agent for the wife." The community being not a new juristic being, but being only a relationship between the two spouses who jointly own the property, the husband (and in certain cases of real estate and the like, the wife also) is the statutory agent for managing the property owned jointly by the parties whose powers of alienation, encumbrance and the like are restricted to the statutory method.

At pp. 29 and 30 of appellant's brief, it is argued that it is proper to treat the community property as the property of the husband alone, because every debt which is incurred by him in the prosecution of community affairs, and every tort which is committed by him when so engaged, constitutes, a liability of the community. It is a well recognized principle of common law, and of the law

generally, that every debt contracted by any manager of property in the prosecution of the business under his management, and every tort which is committed by a manager when so engaged, constitutes a liability of the business and property of which he is manager. We know of no authority which has ever held that, because of this liability of the property or of the principal for the acts and torts of a manager, *the manager becomes the owner of the property which he manages.* The same observation applies to appellant's comment (Brief, p. 41) that, as the community profits by the husband's good judgment, it "must bear the loss of his mistakes," a principle common to all managements.

We submit that there is no intelligible ground for interpreting the clauses of the Revenue Act now under consideration as imposing an excise upon certain powers of management or control, even though these powers could be exaggerated into "dominion" or "command." Appellant cites, in this connection, *Chase National Bank v. United States*, 278 U. S. 327, and *Reinecke v. Northern Trust Co.*, 278 U. S. 339. Both of these cases involved the federal estate tax, which is distinctly an excise levied under the original taxing power conferred by the federal constitution, and has no reference to the income tax authorized by the Sixteenth Amendment. *Knowlton v. Moore*, 178 U. S. 41.

If Congress can constitutionally tax by excise the power of management and control vested in the husband, with respect to community property, it has never attempted to do so, certainly not in the Revenue Act of 1926. The propriety of the federal excise estate tax, levied on the passing of control, by the death of the person having the power of control, is undoubted, but, for obvious reasons, the question now before the Court is of an entirely different nature.

Bromley v. McCaughn, 280 U. S. 124.

"Management" and "control," the descriptive words

used in community statutes to indicate a certain limited power and authority of the husband over the property, do not confer entire ownership or title upon the donee of such powers. In fact, those words most distinctly deny full ownership or title, because if the title were already vested in such donee alone it would be unnecessary to confer upon him powers of management and control. The words are apt for describing a managing partner which the Washington Court says the husband is, calling him "only the head of a firm."

Marston v. Rue, 92 Wash. 129, 131.

"Managing partners," "managers of corporations," and "Corporate Board of Directors" having control of the corporation's affairs, are common and well-known things. No one thinks of confusing any of these functions with ownership. Both to lawyers and laymen, the distinction is too plain for discussion.

The word "dominion" is not found in the Washington statutes, and, so far as we know, it does not appear in any Washington decision. In certain classes of cases, in excises for instance, the word or some equivalent may be found useful. So also, where an owner has made a conditional or defeasible transfer of his title, permitting him to *retake the title* at pleasure (*Corliss v. Bowers,* 281 U. S. 376).

In the present discussion of community property questions, the word "dominion" seems to be seized upon by appellant as some sort of a "bridge" to slide over from "management" or "control" to "ownership." The word "dominion" is too vague in its meaning to furnish any kind of test in deciding the present case. "Dominion" may be a criterion of taxability under some excise statutes, where something less than ownership may be the thing excised. It cannot be properly used to create a doubt as to the meaning of "the net income *of* every individual." The ambiguity of the word, or its Latin original, is men-

tioned by this Court in *Arnett v. Reade,* 220 U. S. 311, 319. By all argumentation rules, a definition should be clearer than the thing defined. So vague a word as "dominion" needs definition more than the words of the Act.

If Congress had intended the words "the net income *of* every individual" to mean "ownership" in some states, "management" in another, "control" in another, and "dominion" in still another, it is certain that Congress would have used some apt words to indicate that intention. The only words used, on the contrary, are those of ownership, which ownership must be determined by the only authority which can determine ownership, namely, the state law.

In appellant's brief (p. 11), it is said:

> "Indeed, the very generality of the words employed suggests that they are to be understood in their ordinary meaning implying dominion and control, and not in any narrow, technical sense, implying formal, legal, or equitable ownership."

The word "owner" is a word in most common use, not only by courts and lawyers, but by everyone. Its meaning is well known. It is probably used in conversation a hundred times where the word "dominion" is used once. When an owner employs a manager or puts a person or a Board in control of his property, he well knows that he is not parting with ownership, and that his ownership is not affected in the least. If the word "dominion" be used in any such connection, the judge, the lawyer or the layman will ask for further particulars. He will say the word is too vague to give him information. And when property or income is spoken of as the property or income "*of*" an individual, no one thinks of the manager as the owner, though he have "control" of it.

M.—ANSWER TO APPELLANT'S CONTENTION WITH REFERENCE TO PRACTICAL DIFFICULTIES IN THE COLLECTION OF THE TAX IF THE INCOME IS DIVIDED BETWEEN HUSBAND AND WIFE.

As stated by the Circuit Court of Appeals, at p. 2 of its certificate:

> "Ever since the year 1920, husbands and wives domiciled in the State of Washington have made separate returns of their community income, each reporting one-half thereof, and taxes have at all times been paid on such returns. This practice has at all times been fully recognized and sanctioned by the opinions of the Attorney General of the United States and by the rulings of the Secretary of the Treasury and other taxing officers of the Government."

No difficulty whatever has arisen in connection with this practical administration of the Act. Appellant's fears in this regard are answered by the historical fact. Further, this fear overlooks the clearly defined boundary line between state and federal jurisdictions. The state alone can define the ownership of property. The federal government alone can levy federal taxes, determine all questions of their incidence, of their lien, and of their collection.

A state statute or a decision which would attempt to say that the community property or any part thereof shall not be liable for a federal tax imposed on the income thereof by the federal government, would be null and void. The state has nothing to do with that question. If appellant were right in the suggested fear, there would be as much difficulty in collecting the income tax under appellant's contention as under that of appellee, since the separate debts of the husband are not collectible out of the community property any more than are the separate debts of the wife.

The tax obligations arising from the federal income tax law are not debts. They do not arise from contract or

tort. They are statutory imposts levied by competent authority, and arise wholly from the statutes levying them.

Appellant's argument under this head proceeds in a vicious circle. Of course, if the wife is assumed not to be the owner of income that is taxed, she can assert no rights as a taxpayer. It is obvious that if the wife is owner of a half interest in the community property and income, having an interest therein equal to that of her husband (as the Washington Courts constantly hold), she is one of the persons taxed by the revenue acts and is subject to all of the obligations and is entitled to all of the remedies relating to any other taxpayer. There is not and could not be any discrimination against a wife in that regard, as Appellant's brief intimates, and all remedies available to the United States are as available against a wife as against a husband.

No difficulty of the kind suggested by Appellant has ever been encountered in the ten years of actual practical experience. An argument is of no validity against a demonstrated fact. As we show elsewhere, the common-law and statutory partnerships existing in so-called "common law" states are constantly recognized by the Treasury Department and the Internal Revenue Bureau. The wife, not the husband, is taxed for her share of the income of such partnerships. The principle is of general application.

N. ANSWER TO APPELLANT'S CONTENTION REGARDING THE PURPOSE OF CONGRESS TO CREATE A NATIONAL SYSTEM.

Appellant's brief, at pp. 16-17, says that the purpose of the Revenue Acts is "to create a national system for the taxation of incomes without discrimination between taxpayers in the several states."

That national system is evidenced by the language of the Revenue Act taxing "the net income *of* every indi-

vidual." Undoubtedly, it implies uniformity and equality in administration. But appellant's implication that that uniformity and equality are to be achieved by assuming some "national" theory of property titles and some "national" theory of the proprietary rights of married persons, would be the gravest error. Property titles and the proprietary rights of married persons remain as absolutely within the individual powers of the several states as if the income tax law had not been enacted.

The revenue acts take as they find them the property rights of individuals, such matters being beyond the control of Congress. Congress, taking into consideration and recognizing the different property systems existing in the various states, enacts revenue laws which impose an equal rate of taxation upon the net income *of* each individual, as that income is defined by state laws. Any uniformity or equality sought to be accomplished *by over-riding state laws* would be destructive of the constitutional system of government. Undoubtedly, as to excises, the federal law, as this Court has frequently held, can place an excise upon anything or the doing of any act or the exercise of any single right relating to property. Such excise tax, however, would have to define the thing or act excised, and define it in a way so that the law *could be applied to the same thing or act in every state.*

So far as concerns the tax under consideration in this case, it does not purport to be an excise upon the exercise of management or control, and does not purport to tax anything but the net income *of* every individual.

FURTHER ANSWER TO APPELLANT'S CONTENTION AS TO OWNERSHIP OF COMMUNITY PROPERTY BY THE HUSBAND.

Appellant's contention that the husband alone, and not the husband and wife jointly, is the owner of com-

munity property and income in the State of Washington, is opposed—

(1) To the language of the Washington statutes.

(2) To the holdings of the Washington Supreme Court as is shown by all the leading cases cited.

(3) To the holdings of this Court in *Warburton v. White,* 176 U. S. 484, *Buchser v. Buchser,* 231 U. S. 157, and *Arnett v. Reade,* 220 U. S. 311.

(4) To the authoritative interpretation of the Washington statutes and decisions made by the Circuit Court of Appeals of the Ninth Circuit, as shown by its certificate in this case.

(5) To the opinion of the Attorney General given in February, 1921 (32 Op. Attys. Gen. 435) and several later opinions.

(6) To the departmental regulations and rules, and nearly ten years of established practice.

(7) To the demonstrated intent of Congress in its refusal to change the language of the Revenue Acts so as to tax community income to the husband alone.

The important question here is not who must pay the tax on community income, but what amount of tax must be paid thereon. In any event, a tax will be paid on the community income. The Revenue Act, however, does not contemplate that the income tax shall be increased in any state by taxing and surtaxing to one spouse alone the entire community income when, by long established state law, that income belongs to the two spouses jointly.

The Washington community property law means *precisely the same now as when it was enacted,* long before the adoption of the Sixteenth Amendment. *Neither that amendment nor the Revenue Act has affected its meaning.* It is still the expression of the will of a sovereign state concerning a subject wholly within its powers.

PARTNERSHIPS BETWEEN HUSBAND AND WIFE, LAWFUL UNDER THE LAWS OF ANY STATE, ARE SPECIFICALLY RECOGNIZED BY THE RULINGS OF THE TREASURY DEPARTMENT. IN ALL SO-CALLED "COMMON LAW" STATES, INCOMES OF PARTNERSHIPS CONSISTING OF HUSBAND AND WIFE ARE DIVIDED BETWEEN THEM AND EACH PAYS THE FEDERAL INCOME TAX ON HIS OR HER INDIVIDUAL SHARE. THE FACT THAT THE HUSBAND IS MANAGING PARTNER OR CONTROLS THE PARTNERSHIP IS NOT TREATED AS MATERIAL.

The General Counsel of Internal Revenue, in his G. C. M. 3421 (C. B. VII-1, January-June, 1928, p. 106) holds that, where the local law permits husband and wife to be partners, and such partnership in fact exists, the share of the partnership profits accruing to the spouses jointly is to be divided between them so that the wife is taxed for one-half of the profits accruing to the husband and wife.

A similar ruling was made by A. W. Gregg, Solicitor of Internal Revenue in S. M. 5411 (C. B. V-1, January-June, 1926, p. 271).

To the same effect are the following authorities:

Appeal of Bellingrath, 3 U. S. B. Tax Appeals, 11;

Sunlin v. Commissioner, 6 U. S. B. Tax Appeals, 1232;

Kahn v. Commissioner, 14 U. S. B. Tax Appeals, 125;

Phelps v. Commissioner, 13 U. S. B. Tax Appeals, 1248.

In the case last cited, the opinion states:

"Nor do we think that it is material that the apparent object of the reorganization of the partnership in 1919 was for the purpose of reducing surtaxes payable by the petitioners. Clearly taxpayers have the right to change their form of organization

and their methods of doing business in any way they may see fit so long as they keep within the law."

It would result in great discrimination against husbands and wives in Washington to hold that the quasi-partnership resulting from their marriage contract, with the rights of each spouse carefully defined by law, is not to be given recognition in the division of income, while voluntary partnerships, formed by husbands and wives in other states by mere contracts *made for the express purpose* of reducing surtaxes, are honored and recognized and made the basis for division of income between husband and wife. Such holding would be a reversal of the rule laid down by this Court in *Lucas v. Earl,* 281 U. S. 111.

In Washington, the husband is *by law* "only the head of a firm" (*Marston v. Rue,* 92 Wash. 129) and the community property "is just as much hers as his," and "her property right in it is as great as his."

In Washington, a husband and wife cannot become partners in any partnership other than the statutory quasi-partnership of the community system.

Board of Trade v. Hayden, 4 Wash. 263.

ARGUMENT POINT IX. There is a clear line of demarcation in respect to income taxes, between the state and federal powers. It is of vital importance that the powers of each sovereignty be upheld.

> "In America, the powers of sovereignty are divided between the government of the Union and those of the states. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."
>
> Chief Justice Marshall, in *M'Culloch v. Maryland*, 4 Wheat. 316, 410.

The proposition is generally recognized by all thoughtful persons in public life that the preservation of the Federal Union, paradoxical as it may seem, depends now and henceforth upon the preservation, unimpaired, of the sovereign powers of the states. This thought was most eloquently emphasized in the address of the Chief Justice of this Court, in welcoming foreign jurists and lawyers at the recent meeting of the American Bar Association at Chicago. It has also been emphasized by many other men in public life for many years.

> Address, Am. Bar Ass'n. Journal, Oct. 1930, pp. 627-8.

Every additional Constitutional Amendment, conferring powers upon the Federal Government, involves the invitation to the several departments of the Federal Government—executive, legislative and judicial—to encroach upon the necessary sovereign powers of the states. On the occasion of the adoption of the Fourteenth Amendment, this danger boldly threatened, but this Court happily put an end to that serious danger in the *Slaughter-house Cases*, 16 Wall. 36, giving to that amendment a limited construction consistent with the preservation of the rights of the states. The Court refused to hold that, by the amendment (in the clause forbidding the states to

abridge the privileges or immunities of citizens of the United States), the states had been deprived of "the exercise of powers heretofore universally conceded to them, of the most ordinary and fundamental character," and the Court, speaking by Mr. Justice Miller, concluded its opinion in the following historic words, which will never fade in importance, and which are appropriate to the consideration of the question now pending:

> "But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this Court, so far as its function required, has always held, with a steady and an even hand, the balance between state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution or of any of its parts."

As to ownership of property, all proprietary questions, the marriage status and its effects on property rights, these powers inhere in the states alone. They must be upheld in full vigor. None of those powers was taken away or weakened to any extent whatever by the Sixteenth Amendment.

That Amendment had in view the varying provisions of the diverse property systems in the forty-eight states, and contemplated its application to the community system of Washington (and equally to the particular property system of every other state) *without prejudicing the rules of property in any state* by reason of the fact that some other state or states maintain (as they have the right to do) other systems with the aim of doing justice between husband and wife.

APPENDICES

There are added to this brief Appendix A and Appendix B. Appendix A contains the statutes of the State of Washington involved in this case. Appendix B is a chronological table setting forth what we conceive to be the principal historical facts through which the question now before the Court has developed. We believe this will be helpful to the Court.

CONCLUSION

Though this cause originally came before the Court on certificate from the United States Circuit Court of Appeals for the Ninth Circuit, this court later granted *certiorari* and the entire record and cause are now before this Court for its final disposition.

For the several reasons hereinbefore stated, the judgment of the District Court herein should be affirmed.

Respectfully submitted,

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APPENDIX A

WASHINGTON STATUTES

TAKEN FROM 2 REMINGTON'S COMPILED STATUTES OF WASHINGTON, 1922

Sec. 6890 (5915) *Separate Property of Husband.* Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried (Cd. '81, Sec. 2408).

Sec. 6891 (5916) *Separate Property of Wife.* The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him (Cd. '81, Sec. 2400).

Sec. 6892 (5917) *Community property Defined—Husband's Control of Personalty.* Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof (Cd. '81, Sec. 2409).

NOTE: Notwithstanding the generality of the lan-

guage of this section the wife is the legal owner of community personal property as much as the husband, and has the same proprietary interest therein. The language of this section means no more than to make the husband the statutory agent of the community and this agency can only be lawfully exercised for the benefit of the community.

Schramm v. Steele, 97 Wash. 309;

Marston v. Rue, 92 Wash. 129;

Olive Co. v. Meek, 103 Wash. 467;

Stewart v. Bank of Endicott, 82 Wash. 106;

Bortle v. Osborne (A case decided by Supreme Court of Washington Feb. 24, 1930, not yet officially reported. The decision may be found in 285 Pacific Reporter, page 425).

(As to devise by will see Sec. 1342, *infra*).

Sec. 6893 (5918) *Community Realty, Conveyance of, etc.* The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon (Cd. '81, Sec. 2410).

(Note to Sec. 6893).

A lease is an encumbrance under this section, and a lease or an agreement for a lease executed by the husband alone is void, even though the wife had knowledge thereof.

Spreitzer v. Miller, 98 Wash. 601;

Kaufman v. Perkins, 114 Wash. 40;
Hoover v. Chambers, 3 Wash. Ter. 26.

Conveyances and agreements for conveyances made by the husband alone are void even as against the husband.

Holyoke v. Jackson, 3 Wash. Ter. 235;
Hill v. Young, 7 Wash. 33;
Mabie v. Whittaker, 10 Wash. 656;
Warburton v. White, 176 U. S. 484;
Adams v. Black, 6 Wash. 528;
Kaufman v. Perkins, 114 Wash. 40.

In suit by a vendee to reform for mutual mistake a written contract for the conveyance of land signed by both husband and wife, reformation is refused unless it be shown that the wife as well as the husband personally participated in the mistake.

Itkin v. Jeffery, 126 Wash. 47.

Sec. 6894 (5919) *Agreements as to Status of.* Nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterward to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged, and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner; Provided, however, that such agreement shall not derogate from the rights of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud, or under some other recognized head of equity jurisdiction, at the suit of either party (Cd. '81, Sec. 2416).

Sec. 6895 (5920) *Separate Earnings of Wife, etc.* A wife may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right, and she may prosecute and defend all actions at law for the preservation and protection of her rights and property as if unmarried (Cd. '81, Sec. 2404).

NOTE: This and the next following section must be construed together. So construed the wife's earnings become her separate property only in case of earnings made while she is living separate from her husband.

Abbott v. Wetherby, 6 Wash. 507, 512;
Marsh v. Fisher, 69 Wash. 570.

Sec. 6896 (5921) *Earnings of Wife and Minor Children.* The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife (Cd. '81, Sec. 2413).

Sec. 7598 (6564) *Married Man—Consent of Wife Necessary.* No assignment of, or order for, wages to be earned in the future shall be valid, when made by a married man, unless the written consent of his wife to the making of such assignment or order is attached thereto (L. '09, p. 52, Sec. 2).

Sec. 6897 (5922) *Tenancy in Dower and by Curtesy Abolished.* No estate is allowed the husband as tenant by curtesy, upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband (Cd. '81, Sec. 2414).

Sec. 6898 (5923) *Liberal Construction.* The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this chapter. This chapter establishes the law of the state respecting the subject to which it relates, and its provisions and all proceed-

ings under it shall be liberally construed with a view to effect its object (Cd. '81, Sec. 2417).

Sec. 6900 (5925) *Married Persons May Acquire and Hold Property, How.* Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy and dispose of every species of property, and to sue and be sued as if he or she were unmarried (Cd. '81, Sec. 2396).

Sec. 6901 (5926) *Civil Disabilities of Wife Abolished.* All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurption of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has: Provided, always, that nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office except as otherwise provided by law (L. '79, p. 151, Sec. 1; Cd. '81, Sec. 2398).

Sec. 6902 (5927) *Contracts and Liabilities of Wife.* Contracts may be made by wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried (Cd. '81, Sec. 2406).

Sec. 6903 (5928) *May Sue Each Other.* Should either husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried (Cd. '81, Sec. 2401).

Sec. 6904 (5929) *Injuries Committed by Married Woman, Liability For.* For all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor,

except in case where he would be jointly responsible with her if the marriage did not exist (Cd. '81, Sec. 2402).

Sec. 6906 (5931) *Family Expenses, Liability For.* The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them and in relation thereto they may be sued jointly and separately (Cd. '81, Sec. 2407).

Sec. 10572 (8766) *Conveyances Between Husband and Wife.* A husband may give, grant, sell, or convey directly to his wife, and a wife may give, grant, sell, or convey directly to her husband *his or her community right, title, interest, or estate in all or any portion of their community real property.* And every deed made from husband to wife, or from wife to husband, shall operate to divest the real estate therein recited from any or every claim or demand as community property, and shall vest the same in the grantee as separate property. The grantor in all such deeds, or the party releasing such community interest or estate, shall sign, seal, execute and acknowledge the deed as a single person, without the joinder therein of the married party therein named as grantee; Provided, however, that the conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift, or conveyance: And provided further, that any deeds of gift conveyances or releases of community estate by or between husband and wife heretofore made, but in which the husband and wife have not joined as grantors, said deeds, where made in good faith and without intent to hinder, delay, or defraud creditors, shall be and the same are hereby fully legalized as valid and binding (L. '88, p. 52, Sec. 1).

Sec. 10575 (8769) *Power of Attorney to Convey Community Property.* A husband may make and execute a letter of attorney to the wife, or the wife may make and execute a letter of attorney to the husband, *authorizing the sale or other disposition of his or her community interest*

or estate in the community property, and as such attorney in fact to sign the name of such husband or wife to any deed, conveyance, mortgage, lease, or other encumbrance, or to any instrument necessary to be executed by which the property conveyed or transferred shall be released from any claim as community property. And either said husband or said wife may make and execute a letter of attorney to any third person to join with the other in the conveyance of any interest either in separate real estate of either, *or in the community estate held by such husband or wife in any real property.* And both husband and wife owning community property may jointly execute a power of attorney to a third person authorizing the sale, encumbrance, or other disposition of community real property, and so execute the necessary conveyance or transfer of said real estate (L. '88, p. 53, Sec. 4).

Sec. 10577 (8771) *Bona Fide Purchaser Protected by Record Title, When.* Whenever any person, married or single, having in his or her name the legal title of record to any real estate, shall sell or dispose of the same *to an actual bona fide purchaser,* a deed of such real estate from the person holding such legal record title *to such actual bona fide purchaser* shall be sufficient to convey to and vest in such purchaser the full legal and equitable title to such real estate free and clear of any and all claims of any and all persons whatsoever not appearing of record in the auditor's office of the county in which such real estate is situated (L. '91, p. 368, Sec. 1).

Sec. 10578 (8772) *Claim in Community Realty to Be Filed, When. A husband or wife having an interest in real estate, by virtue of the marriage relation,* the legal title *of record* to which real estate is or shall be held by the other, my protect *such interest* from sale or disposition by the husband or wife, as the case may be, in whose name the legal title is held, by causing to be filed and recorded in the auditor's offce of the county in which such real estate

is situated, an instrument in writing setting forth that the person filing such instrument is the husband or wife, as the case may be, of the person holding the legal title to the real estate in question, describing such real estate *and the claimant's interest therein;* and when thus presented for record such instrument shall be filed and recorded by the auditor of the county in which such real estate is situated, in the same manner and with like effect as regards notice to all the world, as deeds of real estate are filed and recorded. And if either husband or wife fails to cause such an instrument to be filed in the auditor's office in the county in which real estate is situated the legal title to which is held by the other, within a period of ninety days from the date when such legal title has been made a matter of record, *any actual bona fide purchaser* of such real estate from the person in whose name the legal title stands of record, receiving a deed of such real estate from the person thus holding the legal title, shall be deemed and held to have received the full legal and equitable title to such real estate free and clear of all claim of the other spouse (L. '91, p. 368, Sec. 2).

Sec. 10579 (8773) *Community Claim—Cloud upon Title—Removal of.* The instrument in writing provided for in the last preceding sections shall be deemed to be a cloud upon the title of said real estate, and may be removed by the release of the party filing the same, or by any court having jurisdiction in the county where said real estate is situated, whenever it shall appear to said court that the real estate described in said instrument is the separate property of the person in whose name the title to the said real estate, or any part thereof, appears to be vested, from the conveyances on record in the office of the auditor of the county where said real estate is situated (L. '91, p. 369, Sec. 3).

Note to Secs. 10577, 10578, 10579.

In *Dane v. Daniel* (1900) 23 Wash. 379, it is held

that the failure of the wife to file, in the County Auditor's office, the notice of her community interest permitted by these sections is immaterial, except as against *actual bona fide purchasers,* and that no purchaser can claim to be bona fide unless he shows that he not only did not know of the existence of the marriage but *could not have learned of the marriage by the exercise of reasonable diligence.* In practice few filings are made by wives under these sections, as they rely upon the notoriety of their marriage under the rule of *Dane v. Daniel.*

Sec. 1342. *Descent of Community Property.* Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife *of his or her half of the community property,* it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration (Cd. '81, Secs. 3303, 2411, 2412).

APPENDIX B

CHRONOLOGICAL TABLE

1. December 2, 1869, Legislature of Washington Territory enacts law adopting the community property system for that Territory. During next ten years several material amendments are made. Ever since 1879 all the essential provisions of its present community property system have been the law in the Territory and State of Washington.

2. May 20, 1895, final decision in *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, holding that under the Constitution an income tax is a direct tax, that a tax on the income of real or personal property is a direct tax on the property producing such income, and as a consequence Congress could not, as the Constitution then read, impose such tax unless apportioned among the states.

3. February 25, 1913, the 16th Amendment takes effect, empowering Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," but making no change in the nature of an income tax as a direct tax on the property producing the income, and leaving wholly unimpaired (otherwise than as affected by the 14th Amendment) the constitutional right of each state to determine all property questions, primary and derivative, and all questions of marriage and the property rights incident thereto.

4. October 3, 1913, enactment of first Income Tax Law under 16th Amendment, 38 St. L. 114, part of general Tariff Act. Sec. II A (1) at page 166, levies a tax upon net income arising or accruing "to *every citizen* of the United States, whether residing at home or abroad, and to *every person* residing in the United States." There is

also a surtax in similar language. Sec. II C provides certain exemptions for "each of said persons," the amount being greater if such person is married and living with a husband or wife. Sec. II D (proviso) enacts "that any persons carrying on business in partnership shall be liable for income tax only in their individual capacity, and the share of the profits of a partnership to which any taxable partner would be entitled if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid."

5. December 14, 1914, Treasury Decision 2090 and January 30, 1915, Treasury Decision 2137, without any special reference to community property, promulgate rule that under the then Revenue Act "The income of husband and wife should not be combined in a return of income for the purpose of assessing the additional or surtax," and that "the additional or surtax imposed by the Act will be computed on the basis of the income of each individual." These decisions have never been modified.

6. September 8, 1916, enactment of second Income Tax Law, 39 St. L. 756. Title I, Part I, Sec. 1 (a), levies tax upon "net income received in the preceding calendar year from all sources by *every individual,* a citizen or resident of the United Sttaes." There is also a surtax in similar language. Sec. 7 (a) provides certain exemptions for "each of said persons," the amount being greater if such person is married and living with a husband or wife. Sec. 8 (e) enacts that "persons carrying on business in partnership shall be liable for income tax only in their individual capacity, and the share of the profits of the partnership to which any taxable partner would be entitled if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid under the provisions of this title."

7. October 3, 1917, enactment of war Revenue Act of 1917, 40 St. L. 300. Title I, Sec. 1 makes no change in

normal tax but enacts that in addition to the normal tax imposed by subdivision (a) of Section 1 of the 1916 Act there shall be levied and paid "a like normal tax of two per centum upon the income of *every individual,* a citizen or resident of the United States." Sec. 3 declares that surtax shall be levied and paid upon same basis as in original Act.

8. February 24, 1919, enactment of Revenue Act of 1918, 40 St. L. 1057. Title II, Part II, Sec. 210, at page 1062, levies a normal tax "upon the net income of *every individual.*" Sec. 211 (a) levies a surtax "upon the net income of *every individual.*" Sec. 216 (c) enacts that "a husband and wife living together shall receive but one personal exemption of $2,000 against their aggregate net income; and in case they make separate returns, the personal exemption of $2,000 may be taken by either or divided between them." Sec. 218 (a) enacts "that individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership." Sec. 223 enacts that "If a husband and wife living together have an aggregate net income of $2,000 or over, each shall make such a return unless the income of each is included in a single joint return."

9. April ...., 1920, Commissioner's Office Decision No. 426, 2 C. B. 198, gives specific recognition to the community property laws of Texas and Washington, and authorizes returns dividing income between husband and wife as to income from accumulated community property, real and personal.

10. August 24, 1920, (sometimes cited as dated September 10, 1920) Attorney General Palmer, complying with request of Treasury, renders opinion on rights of Texas husbands and wives respecting community incomes. 32

Ops. Atty. Gen. 298. Attorney General advises that husbands and wives in Texas, in rendering separate income tax returns, may each report as gross income one-half of the total community earnings, and that the same is true as to income derived from community real and personal property already owned.

11. August 24, 1920, this opinion of Attorney General is promulgated as Treasury Decision 3071, 3 C. B. 221.

12. ————————, 1920, Secretary of Treasury requests further opinion of Attorney General declaring to what states other than Texas the foregoing ruling as to community property applies.

13. February 26, 1921, second opinion of Attorney General Palmer, 32 Ops. Atty. Gen. 435. Attorney General answers questions submitted as follows:

> "(1) That in Washington, Arizona, Idaho, New Mexico, Louisiana and Nevada the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income one-half of the income which under the laws of the respective states becomes, simultaneously with its receipt, community property.
>
> "(2) In the states mentioned, in answer to question one, there should be included in gross estate, in computing the estate tax of the deceased spouse, one-half only of the community property of husband and wife domiciled therein.
>
> "(3) Neither of the above answers is based upon a statute [of the state] enacted subsequent to March 1, 1913."

In this opinion, referring to the State of Washington, the Attorney General says:

> "It appears to be the settled law of that state that the wife has, during coverture, as well as upon the dissolution of the marriage, a vested and definite interest and title in the community property, equal in

all respects to the interest and title of her husband therein. Leading cases are: *Holyoke v. Jackson,* 3 Wash. Ter. 235; *Mabie v. Whittaker,* 10 Wash. 656, 39 Pac. 172; *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111; *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634; *Huyvaerts v. Roedtz,* 105 Wash. 657, 178 Pac. 801."

This opinion also includes the following summary:

"Summarizing, it appears that in all of the community property states except California, their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property. Her rights in the property of the community are perhaps more fully recognized in the state of Washington, where both spouses have testamentary disposition over one-half of the community property, and where in the absence of such disposition it descends to their issue, or, in the absence of issue, to the survivor; while the husband is manager of the community estate in Washington, he may not sell, convey or encumber real estate unless the wife join with him in the conveyance; and as was held ni *Huyvaerts v. Roedtz, ante,* and *Schramm v. Steele, ante,* the separate debt of the husband cannot be satisfied out of community property where it is not incurred in connection with community business, nor for the benefit of the community."

14. March 3, 1921, Secretary of the Treasury approves and promulgates foregoing opinion by Treasury Decision 3138. See Internal Revenue Bulletin No. 4, for June, 1921, page 238.

This decision became the basis for Art. 31, of Treasury Regulation 62, under the 1921 Revenue Act, as follows:

"A husband and wife domiciled in Texas, Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada, in rendering separate income tax returns, may each report as gross income one-half of the in-

come which, under the laws of the respective states, becomes, simultaneously with its receipt, community property."

15. April ...., 1921, Revenue Act of 1921 as introduced in House of Representatives, as reported by Ways and Means Committee and as passed by the House contains following clause:

"Income received by any community shall be included in the gross income of the spouse having management and control of the community property."

16. November 23, 1921, Revenue Act of 1921 as reported by Finance Committee of Senate substituted for the above quoted clause in the House Bill the following:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

Report of Senate Finance Committee states at page 14 as follows:

"Under an opinion of the Attorney General, residents of the states having a community property law enjoy marked advantage over residents of other states. Income which in other states is taxed as a unit to the husband, is divided between husband and wife in states having community property laws, and surtaxes are correspondingly reduced. An amendment is added to this section designed to restore uniformity of treatment by providing that income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property and shall be taxed as the income of such spouse."

For the debate and action in the Senate see Vol. 61 Cong. Rec., No. 140, for October 27, 1921, page 6872 *et seq.* and same Volume No. 146, for November 3, 1921, page 7229.

The proposals made by Committees of both House and Senate for the insertion of language which would change the construction adopted by the Attorney General embodied in the Treasury Regulations, concerning community incomes *were refused approval by Congress.* Neither the proposed provision nor any other provision for changing the existing practice as to community incomes *was given any recognition* in the Revenue Act of 1921, with the result that the Revenue Act of 1921, like all of its predecessors, imposed the income tax upon the net income of *every individual.* The details of the Act are given in paragraph 17 next following.

17. November 23, 1921, enactment of Revenue Act of 1921, 42 St. L. 227. Title II, Part II, Sec. 210, at page 233, levies a normal tax "upon the net income of *every individual.*" Sec. 211 (a) levies a surtax "upon the net income of *every individual.*" Sec. 216 (c) enacts that "A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $2500, unless the aggregate net income of such husband and wife is in excess of $5000, in which case the amount of such personal exemption shall be $2000. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them." Sec. 218 (a) relating to partnerships is identical with Sec. 218 (a) of the 1918 Revenue Act.

Sec. 223 (b) enacts that "If a husband and wife living together have an aggregate net income for the taxable year of $2000 or over, or an aggregate gross income for such year of $5000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

18. December 17, 1923, the House Bill which later, as

amended, became the Revenue Act of 1924 was introduced in the House, containing the following provision:

> "Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property and shall be taxed as the income of such spouse."

This proposed provision with reference to community incomes got no farther than the Committee on Ways and Means of the House, which Committee later reported the Bill *with the foregoing clause eliminated* and with *no reference to community incomes* in the Bill. See Hearings before Committee on Ways and Means, House Reports, Revenue Revision 1924, pp. 194, 348, 375, 478, 482. The result was that the Revenue Act of 1924, like all of its predecessors, imposed the income tax upon the *net income of every individual.* The details of the Act are given in paragraph 20 following.

19. March 8, 1924 (34 Ops. Attys. Gen. 376) and October 9, 1924 (34 Ops. Attys. Gen. 395), Attorneys General render opinions regarding imposition of Federal Estate Tax upon community property of decedents resident in California. These opinions note the conflicting character of the California decisions and indicate that the wife's proprietary interest in California is not of the definite and positive character recognized by the statutes and decisions of Washington and other community property states. In the second of these opinions attention is called to the fact that Congress in two re-enactments of the Revenue Law had refused to insert provisions intended to change the existing practice of divided returns by husbands and wives as to community incomes. The opinion is confined, however, to the United States Estate Tax and expressly states that no intimation is made with respect to the income tax on community incomes.

20. June 2, 1924, enactment of Revenue Act of 1924,

43 St. L. 253. Title II, Part II, Sec. 210 (a) at page 264, levies a normal tax "upon the net income of *every individual.*" Sec. 211 (a) levies a surtax "upon the net income of *every individual.*" Sec. 216 (c) enacts that "A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $2500. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them." Sec. 218 (a) relating to partnerships is identical with Sec. 218 (a) of the 1918 and 1921 Revenue Acts. Sec. 223 (b) enacts that "If a husband and wife living together have an aggregate net income for the taxable year of $2500 or over, or an aggregate gross income of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

21. January 4, 1926, decision in *United States v. Robbins,* 269 U. S. 315, holding that in California the wife has no vested interest in community property and that the entire community income should be taxed to husband.

22. February 26, 1926, enactment of Revenue Act of 1926, 44 St. L. 9. Title II, Part II, Sec. 210 (a) at page 21, levies a normal tax "upon the net income of *every individual.*" Sec. 211 (a) levies a surtax "upon the net income of *every individual.*" Sec. 216 (c) enacts that "a husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $3500. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them." Sec. 218 (a) relating to partnerships is identical with Sec. 218 (a) of the 1918, 1921 and 1924 Revenue Acts. Sec. 223 (b) enacts that "If a husband and wife living together have an aggregate net

income for the taxable year of $3500 or over, or an aggregate gross income for such year of $5000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

23. July 16, 1927, Solicitor General and Acting Attory General Mitchell renders opinion to the Secretary of the Treasury, 35 Ops. Atty. Gen. 265, regarding propriety of continuing the existing practice for separate returns of community income by husbands and wives in community property states other than California. Referring to the *Robbins* case, this opinion says:

> "Your request for reconsideration followed the decision of the Supreme Court of the United States in the case of *United States v. Robbins,* 269 U. S. 315, decided January 4, 1926, *in which it was held* that the wife's interest in the community income under the system in force in California in 1918 was not substantial enough during the existence of the community to entitle her to separately return half of it as her income under the Revenue Act of 1918."

This opinion dwells on the fact that "the nature and extent of a wife's interest in community income in any of the states is to be determined from the statutes and decisions of the state," and that it is necessary for the Federal Courts to accept the decisions of the State Courts and to determine from the statutes and decisions of the state the intrinsic nature of the wife's interest. The opinion reaches the conclusion that since "there are very substantial differences between the so-called community property systems in these various states," it is recommended that test cases be initiated in each of the community property states and that the doubts involved in the questions propounded be set at rest by court decisions in such test suits.

This opinion also refers to the administrative action in the existing practice of divided returns, and the undesirability of overturning by administrative action "the method of dealing with community income which has prevailed in certain states."

24. May 29, 1928, enactment of Revenue Act of 1928, 45 St. L. 795. Title I, Subtitle B, Part I, Sec. 11, levies a normal tax "upon the net income of *every individual.*" Sec. 25 (c) relating to exemptions of husband and wife is the same as Sec. 216 (c) of the 1926 Act. Sec. 51 (b) relating to individual or joint returns of husband and wife is the same as Sec. 216 (c) of the 1926 Act. Sec. 181 and Sec. 182 (a) enact that "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity," and that "there shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. These provisions are substantially the same as corresponding provisions in Sec. 218 (a) of the 1918, 1921, 1924 and 1926 Revenue Acts.

25. December 16, 1929, enactment of Joint Resolution of Congress reducing rates of Income Tax for the calendar year 1929. Again the legislative expression is the "normal tax *on individuals.*" All the provisions of the Revenue Act of 1928 are left in force subject to the stated reduction in rates.

26. 1920-1930. For this long period the practice of separate returns by husbands and wives, each reporting one-half of community income, has been followed uninterruptedly by community property taxpayers in the states of Washington, Louisiana, Texas, Arizona, Idaho, Nevada and New Mexico. This practice began with the opinion of the Attorney General and Departmental Regulations in 1920, and has been ever since constantly recognized by all subsequent Departmental regulations, forms and proceedings, so far as concerns the states named. Dur-

ing these ten years, the husbands and wives in the states named have made their tax payments on this basis. This practice has received recognition and approval from Congress in the repeated reenactments of the Revenue Acts in the original language, so construed by the Executive Departments, and in the repeated refusals of Congress to change the language of the statutes taxing the income of "*every individual,*" so as to enact provisions having the proposed statutory meaning and intent now advocated by Apppellant. This practice has never been extended to California taxpayers. The *distinction,* in the practical application of the Revenue Acts, between the case of taxpayers in California and those in the other community property states is expressly recognized in the *Robbins* case, 269 U. S. 315, 326, 327, where the action of the Treasury Department *in making this distinction* is mentioned.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 15.

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v.

H. G. SEABORN.

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C. W. BACON.

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v.

WILLIAM PFAFF.

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FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

v.

I. B. KOCH.

JOINT AND SUPPLEMENTAL BRIEF FOR TAXPAYERS ON CERTAIN QUESTIONS COMMON TO ALL OF THE ABOVE CASES.

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George Donworth,
Charles E. Dunbar, Jr.,
R. C. Fulbright,
Palmer Hutcheson,
Monte M. Lemann,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

Page

Foreword 1

Statement of Points 5

Argument 10

Point I. As a Matter of Independent Statutory Construction the Language and Terms of the Revenue Act of 1926 Do Not Tax the Husband on the Wife's Half of the Community Income 10

(a) The Statute Taxes the Income of Each Individual and Expressly Authorizes Separate Return by Husband and Wife of the Income of Each Spouse..... 10

(b) The Community is not a Trust within the Meaning of the Revenue Act of 1926 13

(c) The Community is Properly Classified as a Partnership each Member of which is Required by the Revenue Act to Report his Separate Share of Partnership Income 15

(d) Nothing in the Language of the 1926 Revenue Act or Prior Acts Indicates a Congressional Intent, Express or Implied, to Tax the Husband on the Community Income of the Wife on the Theory that he has Administration

Page

and Control over her Property and Income 17

(e) Tax Statutes are to be Construed in Favor of Taxpayers 20

(f) Local State Law and Decisions Determine What is Property or Income and to Whom it Belongs..... 21

Point II. Reenactment of Provisions of the Prior Revenue Acts After Uniform and Long Continued Executive Construction Recognizing Right of Husband and Wife to Report Separately the Share of Community Income Owned by Each, and Express Refusal by Congress to Amend Provisions to Avoid Executive Construction Conclusively Shows That There was no Intention to Tax the Husband for the Community Income of the Wife Under the 1926 Act..... 26

(a) Executive Construction and Legislative History of Prior Revenue Acts Affirm the Right to Report Separately the Respective Shares of Husband and Wife in Community Income.....27

(b) Reenactment of Provisions of Statute After Long Continued Administrative Practice Amounts to Adoption by Congress of Such Executive Construction and Practice 39

(c) Contention that "control" and not "ownership" is the Test of Income

Page

Taxation under 1926 Act is inconsistent with and Contrary to the Opinion of Attorney General Rendered July 16, 1927 45

Point III. The Case of United States v. Robbins is not Applicable to the Laws of Community Property States Other Than California Nor Does it Support the Contention that Congress Intended in the 1926 Act to Tax All the Community Income to Spouse Having Control and Administration Thereof..... 51

(a) The Robbins Case Deals Only With the Local Law of California Under Which As Interpreted by its Courts the Husband was the Owner of All the Community Property and Income 51

(b) The Statement that Congress *Could* Tax the Husband in California for the Entire Community Income Does Not Show Either the Power or an Intent to Tax the Husband on the Portion of Community Income In States In Which the Wife Has a Present and Substantial Ownership In Such Income at the Time it Accrues..... 55

Point IV. The Decisions in the Corliss and Earl Cases Are Not Applicable to the Issues Involved Here 62

Point V. The Contention of Appellant That the Revenue Acts Impose Income Tax Upon One

Page

Individual as an Incident to His Control of the Income Vested in Another Individual Under the Applicable Laws of the States, Must be Rejected Because Such Construction Would Render the Statute Unconstitutional 65

(a) It Would be in Part a Direct Tax, Not Based on Income of the Person Taxed and Not Apportioned 69

(b) It Would Result in a Tax Not Geographically Equal and Uniform..... 72

(c) Such a Basis Would be so Arbitrary and Capricious as to Constitute Taking of the Property Without Due Process 73

Appendix 81

O. D. 426 Community Property in Texas and Washington 81

T. D. 3071 Containing Opinion of Attorney General Palmer dated August 24, 1926 Regarding Return of Community Property Income in Texas..... 82

T. D. 3138 Containing Opinion of Attorney General Palmer dated February 26, 1921 Regarding Separate Return of Community Incomes in States Other Than Texas 92

Opinion of Acting Attorney General Mitchell dated July 16, 1927. 35 Op. Atty. Gen. 265 118

CASES CITED.

	Page
Arnett v. Reade, 220 U. S. 311	56, 65
Blodgett v. Holden, 275 U. S. 142	78
Brushaber v. Union Pacific R. R. Co., 240 U. S. 1	71
Bucher v. Cheshire R. Co., 125 U. S. 555	22
Buchser v. Buchser, 231 U. S. 157	22
Burgess v. Seligman, 107 U. S. 20, 27	22
Copper Queen Mining Co. v. Arizona Board of Equalization, 206 U. S. 474	41
Corliss v. Bowers, 281 U. S. 376	62
Dawson v. Kentucky Dist. Co., 255 U. S. 288	71
De Vaughn v. Hutchinson, 165 U. S. 566, 570	22
Eisner v. Macomber, 252 U. S. 189	69
Elmendorf v. Taylor, 10 Wheat. 152, 159	22
Gould v. Gould, 245 U. S. 151	21
Harriman v. Interstate Commerce Commission, 211 U. S. 407	67
Hines Yellow Pine Trustees v. Martin, 268 U. S. 458, 464	22
Home Savings Bank v. Des Moines, 205 U. S. 503	67, 69
Knights of Pythias v. Meyer, 265 U. S. 30	22
Knowlton v. Moore, 178 U. S. 41	73
Komada & Co. v. United States, 215 U. S. 392	42
Lewellyn v. Frick, 268 U. S. 238	66, 74
Lippincott v. Mitchell, 94 U. S. 767	22
Lucas v. Earl, 281 U. S. 376	64
Middleton v. McGrew, 23 Howard 45	22
National Lead Company v. United States, 252 U. S. 140	41
New York v. State of Illinois, 278 U. S. 367	40
Nichols v. Coolidge, 274 U. S. 531	76

Page

Pollock v. Farmers Loan & Trust Co., 157 U. S. 429; 158 U. S. 601 71
Shellabarger v. Commissioner of Internal Revenue, 38 F. (2d) 566 64
The Abby Dodge, 228 U. S. 166, 172 67
Thomas v. United States, 192 U. S. 363..... 71
United States of America v. Cerecedo Hermanos y Compania, 209 U. S. 339 ..... 27, 40
United States v. Crosby, 7 Cranch, 115..... 22
United States v. Delaware & Hudson Company, 213 U. S. 366, 408 66
United States v. C. Falk & Bros., 204 U. S. 143 ..... 27, 42
United States of America v. James E. Farrar, 281 U. S. 624 43
United States v. Jin Fuey Moy, 241 U. S. 394.. 66
United States v. Johnston, 124 U. S. 236..... 41
United States v. Robbins, et al., 269 U. S. 315.... 2, 45, 51
United States v. Walter, 263 U. S. 15..... 67
Untermyer v. Anderson, 276 U. S. 440 78
Warburton v. White, 176 U. S. 323, 484, 496.. 22, 36, 65
Washington v. Miller, 235 U. S. 422 22
Zemurray v. United States, 278 U. S. 600..... 50

MISCELLANEOUS CITATIONS.

Congressional Record, Volume 61, No. 146 for November 3rd, 1921, pp. 8037, 8038..... 36
General Counsel Memorandum 6351..... 23
Hearings before Committee on Ways & Means, House Reports, Revenue 1924, pp. 194, 348, 375, 478, 482 38

Page
Office Decision No. 426, 2 CB 198..... 28, 81
Opinion of Acting Attorney General William D. Mitchell, July 16, 1927, 35 Op. At. Gen. 125.. 23, 24, 45, 61, 118
Opinion Attorney General Palmer, 32 Op. At. Gen. 298 ..... 23, 29, 82
Opinion Attorney General Palmer, 32 Op. At. Gen. 435 ..... 30, 92
Opinions Attorney General, 34 Op. At. Gen. 376, 395, 35 Op. At. Gen. 89, 265..... 23
Treasury Decision 2090 27
Treasury Decision 2137 27
Treasury Decision 3071, 3 CB 221 ..... 29, 82
Treasury Decision 3138, 4 CB 238 ..... 30, 34, 92

STATUTES CITED.

Revenue Act of 1918 28
Revenue Act of 1921 34
Revenue Act of 1924 37
Revenue Act of 1926 ..... 10, 11, 13, 15, 17, and 38

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v.

I. B. KOCH.

JOINT AND SUPPLEMENTAL BRIEF FOR TAXPAYERS ON CERTAIN QUESTIONS COMMON TO ALL OF THE ABOVE CASES.

FOREWORD.

This brief covers certain questions common to all four of the above styled separate actions which are contemporaneously before this Court and is sub-

mitted to reduce repetition of the subject matter in the presentation of the respective cases. The first case in the title, *Burns Poe, Collector, v. Seaborn,* involves the question as to whether or not a married man citizen of the State of Washington is required under the Revenue Act of 1926 to return all community income acquired by him and his wife under the system of community laws in that State, as his income and to pay taxes upon it accordingly. Stated conversely, the question is whether or not the interest of a married woman under the laws of Washington in community income is such as to entitle her to return her share of it as her income and pay taxes upon it accordingly. Each of the other cases involve the identical question as applied, respectively, to the laws of the States of Louisiana, Texas and Arizona.

In each case a brief is being presented to the Court upon the law of the state involved. In each state as a result of opinions of the Attorneys General of the United States and regulations of the Treasury Department, husbands and wives have been making separate returns of their respective shares of community income since 1920. The Department never recognized the right of husbands and wives to make separate returns in California, and this practice has never been in force as to taxpayers in California. After the decision of the Supreme Court in the case of *United States vs. Robbins, et al.,* 269 U. S. 315 (decided January 4th, 1926), with reference to the taxation of community income in California, the Honorable William D. Mitchell, Acting Attorney General, under date of July 16th, 1927, (35 Op. Attys. Gen. 265) after expressing his opinion that the question involved in that case and in the other

states was whether a share of the community income *belonged* to the wife and that this was a matter upon which state statutes and the decisions of the state courts must control, advised the Secretary of the Treasury that while the proper answer to the questions presented might be more evident as to some of the states than as to others, the answers to the questions involved were not so obvious as to make it clear what conclusions the courts might reach with respect to the laws of community property states other than California, and he, therefore, formally withdrew the prior opinions in order to leave the Secretary of the Treasury free to arrange for test cases in the courts or otherwise deal with the matter as might be thought proper. The practice of separate returns, however, has not been changed in any state.

Following this opinion of the Acting Attorney General, the above cases were instituted as test cases in each of the respective states. Upon the trial of each of these cases, contention was made by the Government for the first time that the Revenue Act should be construed as taxing the income to the spouse having control of the receipt and disposition thereof (irrespective of any question of ownership), thus necessarily involving the interpretation of Federal law with respect to taxation. Since this question is common to all four cases and since all of the cases are to be submitted to the Court upon the same date, counsel have deemed that it might be helpful to the Court to consider a joint brief upon these questions. Some of the points covered by this brief are discussed in each of the separate briefs, but not in as much detail as they are here treated and the

parties respectfully request the Court to consider this as a supplemental brief in each of the four cases.

For the purpose of the argument that is to follow in this brief we assume, as we think has been clearly shown in the respective briefs for taxpayers, that under the statutes and decisions of each of the States in question the wife has a vested one half ownership in all income, which under the law of such State becomes community property simultaneously with its receipt.

OUTLINE OF POINTS COVERED HEREIN.

POINT I.

THE LANGUAGE AND TERMS OF THE REVENUE ACT OF 1926, AND PREVIOUS ACTS, CLEARLY AUTHORIZE THE FILING OF SEPARATE RETURNS OF COMMUNITY INCOME BY HUSBAND AND WIFE, AND CANNOT AS A MATTER OF INDEPENDENT STATUTORY CONSTRUCTION, BE INTERPRETED AS TAXING THE HUSBAND IN COMMUNITY PROPERTY STATES ON THE HALF OF THE COMMUNITY INCOME WHICH ADMITTEDLY BELONGS TO AND IS OWNED BY THE WIFE.

(a) **The Statute Taxes the Income of Each Individual, and Husbands and Wives, as Individuals, are Authorized and Permitted by the Express Terms of the Revenue Act of 1926 to Make Separate Returns and Include in Such Separate Returns the Income of Each Spouse.**

(b) **The Community Partnership or Marital Community Does Not Come Within the Meaning and Classification of Trusts, as Described in the Revenue Act of 1926.**

(c) **The "Community Partnership" Should be Classified Under the General Heading of "Partnerships," and the Revenue Act Expressly Provides That Each Partner Shall Report in His Individual and Separate Income Tax Return, His or Her Share of the Partnership Income.**

(d) There is Nothing in the Language of the Revenue Act of 1926, or Prior Acts, Expressly or Impliedly Indicating an Intent on the Part of Congress to Tax an Individual or Husband on Income Belonging to Another Person on the Theory of Administration and Control Over the Property and Income Exercised by the Individual Citizen or Husband Sought to be Taxed.

(e) Statutes Are to be Construed in Favor of Taxpayers

(f) The Question as to What Is Property or Income and to Whom It Belongs Is a Matter to be Determined by the Local State Law and Decisions

POINT II.

THE UNIFORM AND LONG CONTINUED EXECUTIVE CONSTRUCTION RECOGNIZING THE RIGHT OF HUSBAND AND WIFE IN ALL COMMUNITY PROPERTY STATES, EXCEPT CALIFORNIA, TO REPORT SEPARATELY THE SHARE OF COMMUNITY INCOME OWNED BY EACH, TOGETHER WITH THE REPEATED REFUSAL OF CONGRESS TO AMEND THE LAW SO AS TO AVOID SUCH CONSTRUCTION AND THE RE-ENACTMENT BY CONGRESS, WITHOUT CHANGE, OF THE PROVISIONS OF THE REVENUE ACT, WHICH HAD RECEIVED SUCH A LONG CONTINUED AND UNIFORM EXECUTIVE CONSTRUCTION, CONSTITUTE A DEPARTMENTAL AND LEGISLATIVE HISTORY CONCLUSIVELY DEMONSTRATING THAT THERE

WAS NO INTENTION IN THE REVENUE ACT OF 1926 TO TAX HUSBANDS ON THE HALF OF THE COMMUNITY PARTNERSHIP INCOME BELONGING TO THEIR WIVES.

The Executive Construction and Legislative History of the Various Revenue Acts Recognize and Affirm the Right of Husbands and Wives to Report in Separate Returns their Respective Shares of the Community Partnership Income.

Congress has twice rejected Amendments, once in 1921 and again in 1924, Expressly Designed to Tax Husbands in Community Property States on the Community Income, subject to their Administration and Control.

This Court has Repeatedly Held That in the Interpretion of a Doubtful or Ambiguous Statute a Uniform Executive Construction and Administrative Practice will be Given Great Weight, and that the Re-enactment of a Statute in the Same Language which has Previously Received a Long and Uniform Executive Construction Amounts to an Adoption of the Executive Construction by Congress.

The Government's Contention that "Control" and not "Ownership" is the Test of Income Taxation Under the Revenue Act of 1296 Is Inconsistent with and Contrary to the Last Opinion on this Subject Rendered by Then Acting Attorney General William D. Mitchell, on July 16, 1927 (after the Robbins Case Dealing with the California Law was Decided) in which Opinion it was Ruled that

the Revenue Act of 1926 Intends to Tax a Husband and Wife on the Income of Each to be Determined by the Statutes and Decisions of Each State.

POINT III.

THE DECISION OF THE SUPREME COURT IN THE CASE OF *UNITED STATES v. ROBBINS*, INVOLVING THE LAW OF CALIFORNIA, IS NOT APPLICABLE TO THE LAWS OF OTHER COMMUNITY PROPERTY STATES AND DOES NOT SUPPORT THE GOVERNMENT'S CONTENTION THAT CONGRESS INTENDED TO TAX ALL COMMUNITY INCOME IN OTHER STATES TO THE SPOUSE HAVING CONTROL OF THE RECEIPT AND ADMINISTRATION AND DISPOSITION THEREOF.

(a) The Robbins Case Deals only with the Local Law of California, and the Underlying Theory of the Decision is that under the Decisions and the Statutes of California, the Husband is in Law the Owner of All of the Community Property and Income, and Possesses All of the Substantial Attributes of Ownership.

(b) The Reasons Presented in Support of the Conclusions Reached in the Last Paragrah of the Robbins case are at Most Reasons and Arguments Why Congress had the Power to and, as Matter of Legislative Policy SHOULD Tax Husbands in States having Community Laws Similar to California on the Entire Community Income, including the Portion of the Community Income in

Which the Wife Has Only an Expectant Interest Similar to her Interest in California; and do not Show That Congress Actually INTENDED to Use or Actually Did Use Language Taxing Husbands in Other States on the Portion of the Community Income in Which Under the Local Law, the Wife has a Present and Substantial Ownership at the Time it Accrues.

POINT IV.

THE DECISIONS IN CORLISS V. BOWERS AND LUCAS V. EARL, CITED IN THE GOVERNMENT'S BRIEF, ARE NOT APPLICABLE TO THE ISSUES INVOLVED IN THESE CASES.

POINT V.

THE CONTENTION OF APPELLANT THAT THE REVENUE ACTS IMPOSE INCOME TAX UPON ONE INDIVIDUAL AS AN INCIDENT TO HIS CONTROL OF THE INCOME VESTED IN ANOTHER INDIVIDUAL UNDER THE APPLICABLE LAWS OF THE STATES, MUST BE REJECTED BECAUSE SUCH CONSTRUCTION WOULD RENDER THE STATUTE UNCONSTITUTIONAL, IN THAT

(a) It Would Be in Part a Direct Tax, Not Based on Income of the Person Taxed and Not Apportioned.

(b) It Would Result in a Tax Not Geographically Equal and Uniform.

(c) Such a Basis Would Be so Arbitrary and Capricious as to Constitute Taking of the Property Without Due Process.

ARGUMENT.

POINT I.

THE LANGUAGE AND TERMS OF THE REVENUE ACT OF 1926, AND PREVIOUS ACTS, CLEARLY AUTHORIZE THE FILING OF SEPARATE RETURNS OF COMMUNITY INCOME BY HUSBAND AND WIFE, AND CANNOT, AS A MATTER OF INDEPENDENT STATUTORY CONSTRUCTION, BE INTERPRETED AS TAXING THE HUSBAND IN COMMUNITY PROPERTY STATES ON THE HALF OF THE COMMUNITY INCOME WHICH ADMITTEDLY BELONGS TO AND IS OWNED BY THE WIFE.

(a) The Statute Taxes the Income of Each Individual, and Husbands and Wives, as Individuals, are Authorized and Permitted by the Express Terms of the Revenue Act of 1926 to Make Separate Returns and Include in Such Separate Returns the Income of Each Spouse.

Each of the statutes levying income taxes undertakes to tax the net income of each individual citizen of the United States. The Act of 1913 assessed a tax "upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States." Through all of the succeeding Acts down to and including the Act of 1926, the language employed has in substantially the same terms levied a tax upon the net income of each *individual* however acquired.

The Revenue Act of 1926, under the heading of

"INDIVIDUALS" and under the heading of "INDIVIDUAL RETURNS", contains the following pertinent sections:

"INDIVIDUALS.

Normal Tax.

SEC. 210 (a) In lieu of the tax imposed by Section 210 of the Revenue Act of 1924, there shall be levied, collected and paid for each taxable year *upon the net income of every individual* (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, etc.

Surtax.

SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year *upon the net income of every individual* a surtax as follows: etc.

Individual Returns.

SEC. 223. (a) *The following individuals shall each* make under oath a return stating specifically the items of *his gross income* and the deductions and credits allowed under this title—(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife; (2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and (3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

SEC. 223. (b) *If a husband and wife living together* have an aggregate net income for the tax-

able year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—(1) *Each shall make such a return, or* (2) *The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.*

Sec. 216. (c) A husband and wife living together, shall receive but one personal exemption. The amount of such personal exemption shall be $3,500. *If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.*" (Italics throughout above quotations ours)

The above sections of the Revenue Act, it is to be noted, give to husbands and wives a right to elect to file separate returns or a single joint return, and plainly state that the *income of each* may be included in separate returns or consolidated in a single return. Where separate returns are filed the Revenue Act does not permit the calculation of their tax liability "on the aggregate income." This construction of the Statute, clear upon its face, has been approved expressly or tacitly by every Attorney General who has considered the point (See Opinions of Attorney Generals Palmer, Daugherty, Stone and Mitchell cited *infra*). In Louisiana, Texas, Arizona and Washington community income has been divided between husband and wife in their Income Tax Returns on the basis of joint ownership, for many years, in accordance with the Rules and Regulations of the Internal Revenue Department specifically established in accordance with an opinion rendered by the Attorney General of the United States. This was the procedure followed by the plaintiff and his wife in each of the cases before the Court.

The statute we have quoted pertinent to this discussion employs the same language as the preceding Revenue Acts of 1921 and 1924.

(b) The Community Partnership or Marital Community Does Not Come Within the Meaning and Classification of Trusts, as Described in the Revenue Act of 1926.

The marital partnership or community cannot by any stretch of the imagination be held to come within the meaning and description of *Trusts*, as defined and described in the Revenue Act of 1926. (Section 219a). The legal history of the community partnership and its attributes and relationships are *sui generis* and have never been described or defined by either the civil or common law jurisprudence and text book writers as *Trusts*, as known to and defined by the common law. It is not even contended in the government's brief that the community partnership is a *Trust* within the meaning of the Revenue Act of 1926. It is suggested, inferentially, however, in the government's brief that the husband as manager of the community partnership is analagous to a trustee and that trustees are required, under certain circumstances, to pay an income tax on the trust property under their control. The analogy suggested, upon analysis, is clearly fallacious and, as a matter of fact, is in favor of the taxpayer in this case rather than the contention of the government. It is to be particularly noted that a trustee under certain circumstances is merely required to make a separate return for and pay the tax on the income of the trust estate which belongs to the beneficiary and which is under the control of the

trustee. The income tax paid is paid out of the funds of the trust estate and not by the trustee personally. Furthermore, the trustee is not required to add to his *individual income* the *income of the trust estate under his administration for the purpose of calculating the surtax*, which is the principle the government is contending should be applied to the husband in the case of community partnership income. The trustee makes a separate return as an individual, in which is included his personal income, and makes a separate return as trustee for the trust estate, in which is included the income from the property belonging to the beneficiary which is under his control. Even if we assume, for the purpose of argument, that the husband, as managing partner of the community partnership can be analogized to a trustee (which inference, as we have shown, is not justified as a matter of statutory construction), the husband, nevertheless, would be required, under the plain language of the Revenue Act, to make a separate return as trustee of the community income, and another separate return of his individual and separate income, if he possessed any. The *Robbins* case, relied on by the government, clearly holds, on the contrary, that the husband must include in his individual separate return the half of the community income which it was claimed in that case belonged to the wife, and that such community income must be added to his income for the purpose of computing his individual surtax. The reason why the so-called share of the community income of the wife was required to be included in the husband's return in the *Robbins* case, was because the court decided, not that the husband was a trustee, but that all of the in-

come was actually owned by and belonged to the husband, which was the real point at issue in the case.

(c) The "Community Partnership" Should be Classified Under the General Heading of "Partnerships," and the Revenue Act Expressly Provides That Each Partner Shall Report in His Individual and Separate Income Tax Return, His or Her Share of the Partnership Income.

Section 218(a) of the Revenue Act of 1926, under the heading "PARTNERSHIPS", provides that:

> "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, etc."

The Community or Marital Partnership, inherited from the Spanish and French Laws, is certainly more closely analogous to Partnerships, as they are known to and defined by the common law, than to Trusts or any other common law status or legal relationship. Generally the husband in Community Property States is the *Managing Partner* of the *Community Partnership*, with liberal powers of administration so long as he acts in good faith and the partnership is not dissolved or liquidated for the reasons provided by law. (In certain states, under statutory authority, the wife is managing partner as to a portion of the community property and may under certain circumstances become the managing partner as to all of such property). If the Marital Community or Partnership is to be con-

sidered as having been expressly included or referred to by analogy at all in the Revenue Act of 1926, it is submitted that logically and substantially it is described under the general heading of *Partnerships* quoted above, because the Community Partnerships is more similar in all of its legal and practical attributes and characteristics to Partnerships than to *Trusts* as known to the common law.

If the Marital Partnership is analogized to partnerships as described in the Revenue Act of 1926, then the Revenue Act does not require the making of a return and the payment of an income tax by the managing partner based on the entire partnership income, but, on the contrary, each partner is permitted to report his share of the partnership income in his *individual return.* The husband and wife composing a community partnership, as the plaintiff and his wife in each of the instant cases, would each report in *separate returns his or her half* of the community property income, in accordance with the express terms of the Revenue Act as hereinabove quoted.

It is clear from what has already been said that the original Revenue Act and all subsequent revisions of the law down to and including the Revenue Act of 1926, have been eloquently silent insofar as Marital Partnerships or the Community Property system are concerned. Although we have seen that *Trusts, Corporations* and *Associations,* as known to the common law, are defined and classified, and are given separate treatment, for purposes of taxation, in the Revenue Act of 1926, there is no mention of the *Community Partnership* in the Income Tax Law, or any reference to the husband's duty as managing partner, agent or trustee, to make a return for the wife's share of Com-

munity Income, and above all there is no suggestion in the law of the astounding proposition that the husband should add to his own personal income the share of the wife in the Marital Partnership income which has never vested in the husband and admittedly belongs to the wife, according to the fundamental laws of the states here involved.

The only heading and sections of the Revenue Act, therefore, under which the wife's half interest in the community can be reported are the sections already referred to and quoted from (Sections 223 (a), (b), 210 & 211) expressly permitting husbands and wives to each report in separate returns the *income of each*, and accordingly the wife's half interest in the Community Partnership Property income is reported in her return as her income, and the husband's half interest is reported as his income in his individual separate return. This is the exact procedure that was adopted by the plaintiff and his wife in each of the cases now before the court.

(d) There is Nothing in the Language of the Revenue Act of 1926, or Prior Acts, Expressly or Impliedly Indicating an Intent on the Part of Congress to Tax an Individual or Husband on Income Belonging to Another Person on the Theory of Administration and Control Over the Property and Income Exercised by the Individual Citizen or Husband Sought to be Taxed.

The government contends that the last paragraph of the *Robbins* case indicates that the Revenue Act is to be construed as not only taxing an individual on his own property and income, but, in addition, on the income and property belonging to others, over which

he exercises certain attributes of control and management.

There is nothing in the language of the Revenue Act which either expressly or impliedly indicates an intention to tax individuals or husbands on income admittedly owned by another person on the basis of the control and dominion over the property and income exercised by the person or husband sought to be taxed. We have already shown under previous headings of this brief that the Act plainly indicates that it intends to tax *individuals* on the income belonging to the *individuals.* By the language of the Act it is the net income "of" an individual which is taxed, not net income "controlled by" an individual. The Act treats husbands and wives as individuals and states that husbands and wives are to be *separately taxed,* if they so elect, on the *income of each.*

To say that the Act contemplates the taxing of an individual on income that does not belong to him, because he has certain elements of control and dominion as an agent in the administration of the property, would by analogy justify the argument that the Act contemplates that a *managing partner* of an *ordinary partnership* must add to his separate individual income the income of the entire partnership, even though other partners are owners of a substantial part of the income, for the purpose of calculating his individual income tax, because as managing partner he possesses and exercises certain attributes of control and dominion. It could also be argued with equal plausibility that in the case of a *trust,* especially a *spendthrift trust,* where the trustee has liberal powers of administration and control and the beneficiaries are correspondingly restricted, the trustee should *add*

to his *individual separate income the income from the trust administered by him, for the purpose of calculating his income tax, because of the dominion and control exercised by the trustee with respect to the spendthrift trust estate.*

The answer to all of these suggestions and analogies is that the plain language of the Revenue Act expressly provides to the contrary. *Trustees* are authorized and required to make separate returns as *individuals* and as *Trustees* for the *Trust Estates* under their administration and control; and each partner, under the provisions of the Revenue Act, makes an individual return of his share of the partnership income, irrespective of any question of relative dominion or control. The husband has no more complete control in a Marital Partnership than a managing partner of an ordinary partnership where the contract of partnership vests liberal powers of control and administration in the managing partner. There is not a word or section in the present Revenue Act, or any previous Revenue Act, which (even remotely) implies that Congress intended not only to tax individuals on their *own* income, but also on the income of others where the individuals in question were *agents or administrators possessing and exercising elements of control and dominion over the income actually vested in and owned by others.*

The assertion by counsel for the Government that the test is administration or control, instead of ownership, has no support whatever in the language of the Act. One can search in vain for any language or implication which even faintly suggests the compulsory grouping of the husband and wife as the *target* of a single tax, or which requires a tax levy to be made

upon their joint incomes. The basic idea of an individual income tax is that persons owning individual incomes shall contribute to the support of the government on the basis of the income owned. The burden is imposed upon those who have prospered financially and the rate is fixed by the amount of the taxpayer's prosperity. The tax is imposed upon "gain", "profit," "income," but only upon the gain, profit and income of the individual taxed. The essential element is ownership, and ownership is fundamental in any conception of gain, profit or income.

We will show, later on in this brief, that in 1921 and again in 1924, amendments to the Revenue Acts were proposed in Congress at the instance of the Treasury Department, purporting in plain language to tax the husband on the income from the community partnership *because of his control and administration.* These amendments were rejected by Congress as a matter of equity and fairness to the community property states, and such action clearly indicates the intention of Congress not to tax the husband on the income from the wife's half of the community partnership property, in community property states. In other words, Congress has twice repudiated attempts by the Internal Revenue Department to write into the Revenue Act language designed to bring about the result which the Government is now contending can be inferred from the Act without such express language.

(e) Statutes Are to be Construed in Favor of Taxpayers

It is a well settled and fundamental principle that statutes relating to taxes will not be construed so as

to levy taxes by implication. The taxpayer is entitled to the benefit of all ambiguities and uncertainties in the matter of interpretation of statutes which would have the effect of levying additional taxes upon such taxpayer. This principle has become elementary. See *Gould vs. Gould,* 245 U. S. 151:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. *United States v. Wigglesworth,* 2 Story 369, Fed. Cas. No. 16,690; *American Net & Twine Co. v. Worthington,* 141 U. S. 468, 474, 35 L. Ed. 821, 824, 12 Sup. Ct. Rep. 55; *Benziger v. United States* 192 U. S. 38, 55, 48 L. Ed. 331, 338, 24 Sup. Ct. Rep. 189."

The Revenue Act of 1926 and previous acts are clear and unambiguous as we have pointed out. If, for the purpose of this argument, however, we assume they are uncertain, the principle of law announced above would clearly apply under the circumstances of this case.

(f) The Question as to What Is Property or Income and to Whom It Belongs Is a Matter to be Determined by the Local State Law.

The present Revenue Act and all prior acts clearly evidence and indicate an intention to *tax an individual on the income which belongs to him and not the income of others, and the question as to what is prop-*

erty or income in any particular case for the purpose of applying the Federal Income Tax Law is and has always been considered a matter depending solely upon the local state statutes and decisions defining income and property rights. It has always been recognized, as we have heretofore pointed out, that the Federal Revenue Acts, in taxing the income of *individuals,* do not purport to specify just how and under what circumstances income or property will vest in such individuals. The Federal Government generally recognizes that the laws of the respective States as to what is property and income, and in whom title to property or income is vested, are binding upon the Federal Government and will be followed by it, unless there is some *affirmative* and constitutional Federal Statute to the contrary.

This Court has repeatedly held that as a matter of settled policy it will follow the state decisions interpreting state laws governing property and property rights. See *De Vaughn* v. *Hutchinson,* 165 U. S. 566, at page 570; *Warburton* v. *White,* 176 U. S. 484, at page 496; *United States* v. *Crosby,* 7 Cranch, 115; *Middleton* v. *McGrew,* 23 Howard 45; *Lippincott* v. *Mitchell,* 94 U. S. 767; *Washington* v. *Miller,* 235 U. S. 422; *Buchser* v. *Buchser,* 231 U. S. 157; *Elmendorf* v. *Taylor,* 10 Wheat. 152, 159; *Hines Yellow Pine Trustee* v. *Martin,* 268 U. S. 458, 464; *Knights of Pythias* v. *Meyer,* 265 U. S. 30; *Bucher* v. *Cheshire R. Co.,* 125 U. S. 555; *Burgess* v. *Seligman,* 107 U. S. 20, 27.

The proposition of law we have stated, is well settled and has been consistently applied, without a question as to its soundness, by the General Counsel of the Internal Revenue Bureau and in every opinion of an Attorney General discussing the Community

Partnership laws, from the opinion of Attorney General Palmer in 1921 to the opinion of Acting Attorney General Mitchell in 1937 including the opinions of Attorney General Daugherty (1924) Stone (1924) and Sargent (1926). See 32 *Op. At. Gen.* 298, 435; 34 *ibid.* 376, 395; 35 *ibid.* 89, 265.

General Counsel Memorandum 6351 holds that certain cash bonuses received by a married woman in Texas constituted separate income to her and were not community property. The following language in the opinion of the General Counsel is illustrative of his view of the principle we have stated:

> "For the purpose of determining the respective rights of A and B in and to the fund which the bonuses constituted, the law of Texas must be considered, for it is settled that the Federal courts follow the State courts where they have spoken in regard to the property rights of their citizens. (*De Vaughn* v. *Hutchinson,* 165 U. S. 566; *Erie Railroad Co.* v. *Hilt,* 247 U. S. 97.) In this manner the Federal courts apply the State law in determining the owner of the fund regarded as income, and so ascertain the person to whom that income is to be taxed. (*Etta Radin, Administratrix* v. *Commissioner,* C. C. A. 3d. Circuit, April 9, 1929; G. C. M. 4596, C. B. VII-2, 133; I. T. 1267, C. B. I-1, 212; I. T. 2349, C. B. VI-1, 78; T. C. 2987, G. B. 2, 180)."

In the opinion of Attorney General Palmer, rendered February 26, 1921 (32 Op. Att-Gen. 435) in which it was ruled that separate returns of community income could be made by husbands and wives in the so-called community property states, except California, it was said:

"In *Warburton* v. *White* (176 U. S. 484, 496) the principle was enunciated that where State decisions have interpreted State laws governing property or controlling relations that are essentially of a domestic and State nature the United States Supreme Court will follow the State decisions if possible to do so, in the discharge of its duties. Also in *DeVaughn* v. *Hutchinson* (165 U. S. 566, 570) it was held that to the law of the State in which property is situated we must look for the rules which govern its descent alienation and transfer, and for the effect and construction of wills and other conveyances. In *United States* v. *Crosby* (7 Cranch, 155), it was held that the title to land can be acquired and lost only in the manner prescribed by the law of the place where same is situated.

"In arriving at an answer to the questions propounded by you we are called upon to determine the rules of property in the community property States; we have, therefore, pursuant to the rules of the above cases, adopted the rules laid down by the highest courts of the various States."

Attorney General Palmer, in concluding his opinion, said:

"That under the Revenue Act of 1918 and previous acts in Washington, Arizona, Idaho, New Mexico, Louisiana and Nevada, (excepting California) the husband and wife domiciled therein, in rendering separate income tax returns may each report as gross income one-half of the income which under the laws of the respective States becomes, simultaneously with its receipt, *community property.*"

Acting Attorney General Mitchell in his opinion of July 16th, 1927, *rendered after the decision in the Robbins case,* said:

"The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income if that income belongs to him, and to prevent the wife from returning a share of the community income as her own, unless that share belongs to her * * *. The nature and extent of a wife's interest in community income in any of these States (Community States), is to be determined from the Statutes and decisions of the State. In determining the nature of an interest in community income created by State law, it is necessary for the Federal Courts to accept the decisions of the State courts construing the statutes creating the interest, and to determine from the statutes and decisions of the State courts the intrinsic nature of that interest."

Under the Texas, Washington, Louisiana and Arizona Statutes and Supreme Court decisions, the wife has a vested one-half ownership in community partnership property and income.

POINT II.

THE UNIFORM AND LONG CONTINUED EXECUTIVE CONSTRUCTION RECOGNIZING THE RIGHT OF HUSBAND AND WIFE IN ALL COMMUNITY PROPERTY STATES, EXCEPT CALIFORNIA, TO REPORT SEPARATELY THE SHARE OF COMMUNITY INCOME OWNED BY EACH, TOGETHER WITH THE REPEATED REFUSAL OF CONGRESS TO AMEND THE LAW SO AS TO AVOID SUCH CONSTRUCTION, AND THE RE-ENACTMENT BY CONGRESS, WITHOUT CHANGE, OF THE PROVISIONS OF THE REVENUE ACT, WHICH HAD RECEIVED SUCH A LONG CONTINUED AND UNIFORM EXECUTIVE CONSTRUCTION, CONSTITUTE A DEPARTMENTAL AND LEGISLATIVE HISTORY CONCLUSIVELY DEMONSTRATING THAT THERE WAS NO INTENTION IN THE REVENUE ACT OF 1926 TO TAX HUSBANDS ON THE HALF OF THE COMMUNITY PARTNERSHIP INCOME BELONGING TO THEIR WIVES.

Under the preceding headings of this brief we have discussed the plain and unambiguous meaning of the language used in the Revenue Act of 1926 without reference to departmental decisions, construing the language or to the legislative history in connection with the use of such language. We have attempted to make clear that the Revenue Act, taken alone and fairly and literally interpreted as a matter of independent statutory construction, does not justify the contention of the Government that the husband should be required to include in his individual income tax

return the half of the community partnership income which vests in the wife as it is earned.

We now propose to show that the opinions of the Attorney General and the Treasury Department in their rulings and decisions have repeatedly and consistently at all times up to this date interpreted similar language in the prior Revenue Acts as permitting husbands and wives to divide and report the community property partnership income in separate returns and that, furthermore, as a matter of legislative history, Congress has twice rejected, once in 1921 and again in 1924, attempts to write into the act language designed to bring about the result for which the Government is now contending. Such departmental construction and legislative history clearly demonstrate the practical intent of Congress, and this Court has repeatedly decided that the reenactment by Congress, as in this case, without change of a statute which has previously received a long executive construction, is an adoption of such construction. *United States v. Falk*, 204 U. S. 143, p. 152; *United States of America v. Cerecedo Hermanos y Compania*, 209 U. S. 339, and numerous other cases to be cited and discussed later.

The Executive Construction and Legislative History of the Various Revenue Acts Recognize and Affirm the Right of Husbands and Wives to Report in Separate Returns their Respective Shares of the Community Partnership Income.

As early as 1914, under Treasury Decisions 2090 and 2137, the Treasury Department ruled that income taxes are imposed upon each *individual* and that the separate incomes of husbands and wives should not be

combined in a return for the purpose of assessing surtaxes at the graduated rates. This ruling, of course, was merely in the nature of an announcement of what the law itself plainly stated.

Discussion between taxpayers and the Commissioner's Office in relation to the right of husbands and wives in Texas and other states to divide community income, resulted in the first published ruling in April, 1920, at which time specific recognition was given to the laws of Texas in Office Decision No. 426, reported at 2 C. B. 198. In this ruling it was held that income accruing from community property is the joint income of the husband and wife, in which each is entitled to one-half and that such income might be reported separately by each spouse for income tax purposes. This ruling was unsatisfactory, because it gave only partial recognition to the Community Property Law of the State of Texas and a protest against the Office Decision was made to the Solicitor of Internal Revenue, and the Attorney General of the U ited States was requested to give an opinion upon the subject. As a result of this request, the Attorney General, after careful consideration and exhaustive study, rendered an opinion under date of August 24th, 1920, which discussed at length the Texas Constitution, the Texas Statutes, Decisions of the Supreme Court of Texas and the interpretation of the Revenue Act. This opinion illustrates the conclusion of the Attorney General in relation to the right of husbands and wives in Texas to make separate returns of Community Partnership Income under the Revenue Act of 1918. After pointing out that

> "The Revenue Act of 1918 levies a tax on the net income of every individual (Sections 210 and 211)",

the Attorney General then reviews the Statutes and Decisions of Texas "determining property rights of husband and wife" and reaches the following conclusion:

> "Community property, under the laws of Texas, belongs jointly to husband and wife; it follows that the income therefrom accrues to husband and wife in equal shares."

It was, therefore, ruled that under the Revenue Act of 1918 a husband and wife in Texas might render separate income tax returns, each reporting, as gross income, one-half of the community income in which they had a joint and equal ownership under the State law.

This opinion of the Attorney General was subsequently published and adopted as Treasury Decision 3071, reported at 3 C. B. 221, and was carried into the Regulations which were applied retroactively. (For opinion in full, see appendix to this brief.) In the Texas opinion, it is to be noted, the Attorney General quoted from the Revenue Act of 1918 (Sections 210 and 211) and emphasized that the Act imposed a tax on the net income of *every individual*. The Attorney General also referred to decisions of the courts of other Community Property States and indicated that similar holdings might be made as to the other states.

While the Texas opinion was under consideration, the Solicitor of Internal Revenue and the Attorney General were confronted with requests from other Community Property States for a similar ruling and

briefs were filed with the Attorney General, pointing out that the same opinion should be rendered as to the other Community Property States.

As a result of the request of the Treasury Department, the Attorney General rendered an exhaustive opinion on February 26, 1921 (32 Op. Att.-Gen. 435), which was published and promulgated by the Treasury Department on March 3, 1921. *In this opinion the Attorney General construes the Revenue Act of 1918 and previous Revenue Acts as taxing a husband and wife, for normal and surtax purposes, on their income as separate individuals and held that under the Revenue Acts the question as to what was the income of the husband and what was to be considered as the income of the wife was a matter to be determined by an examination of the local Statutes and Supreme Court decisions in each of the Community Property States creating and defining property and property rights.* The Attorney General, accordingly, reviewed the Statutes and court decisions of the various Community Property States at length and reached the conclusion that the wife had an equal, vested and proprietary interest in half of the community property in the states of Washington, Texas, Louisiana, Arizona, New Mexico, Nevada and Idaho and might, in these States, make a separate return of half of such community income for income tax purposes.

In California, however, as pointed out by the Attorney General, the local Community Property Law was different in its attributes of ownership and legal nature from the other states and the California Supreme Court had recognized such fundamental difference. The Attorney General, accordingly, held that under the law of California the wife did not have

an equal vested interest in the community property with the husband but merely the right of an "expectant heir," and that the community income should be returned by the husband.

The same conclusion was reached in the opinion of February, 1921, as to the method of applying the Federal Estate Tax. It was held that in all of the Community Property States, *except California,* there should be included in the gross estate in computing the estate tax of a deceased spouse, one-half only of the community property of husbands and wives domiciled therein.

The opinion of the Attorney General is a carefully prepared and written document of about forty pages, which is printed in full in the appendix hereto. We here quote only certain parts of the opinion which we desire to particularly emphasize.

In the first place, the Attorney General at the outset states the question submitted to him for his opinion as follows:

> "Dear Mr. Secretary: My opinion has been requested upon the following questions:
>
> "1. In which of the States, other than Texas, in which the community property system exists may a husband and wife domiciled therein, in rendering separate income tax returns, each report as gross income one-half of the income which under the laws of such state becomes, simultaneously with its receipt, community property?
>
> "2. In which of the States in which the community property system exists should there be included in gross estate, in computing the estate tax of the estate of a deceased spouse, one-half and only one-half of the community property of husband and wife domiciled therein?
>
> * * * * * * *

"4. Do your answers to questions 1 and 2 apply under income and estate tax acts prior to the revenue act of 1918?"

"The community property system prevails in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. The application of the income tax act to the income from community property belonging to husband and wife domiciled in Texas was disposed of in my opinion of September 10, 1920."

The opinion then quotes in full the statutes and discusses the decisions of the various Community Property States at great length and summarizes the Attorney General's conclusions as to the nature of the wife's interest in the States in question as follows:

"Summarizing, it appears that in all of the community property States except California their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property."

* * * * * * * *

"In my previous opinion it was stated that since in Texas the ownership in one-half of all community property vests in each spouse, whatever is income to the community is income to both. This conclusion applies, therefore, to all States in which community property is held to be vested equally in both spouses."

Finally discussing the applicability of the Federal Estate Tax in the Community Property States other than California, which the Attorney General excepted on the ground that the wife, under the California law and decisions, did not have a vested in-

terest in the community property but only an expectancy, he said:

> "While the community estate of husband and wife has not in the strictest sense all the incidents of a joint estate or an estate in the entirety as they were known at common law, I am convinced that the community estate is for all practical purposes within the language of subdivision (d) of section 402, there being deductible therefrom, in arriving at the net estate of decedent, the one-half interest of the surviving spouse which may be shown to have originally belonged to such person and never to have belonged to the decedent."

The Attorney General concludes his opinion as follows:

> "My answers to your questions are therefore—
> (1) That in Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income, one-half of the income which under the laws of the respective States becomes simultaneously with its receipt, community property.
> "(2) In the States mentioned in answer to question 1 there should be included in gross estate in computing the estate tax of a deceased spouse, one-half only of the community property of husband and wife domiciled therein.
> "(3) Neither of the above answers is based upon a statute enacted subsequent to March 1, 1913.
> "(4) My answers to these questions apply under income and estate tax acts prior to the revenue act of 1918.
>
> Respectfully,
> A. MITCHELL PALMER,
> *Attorney General.*

The above opinion was promulgated by the Treasury Department and put in operation by the issuance on March 3, 1921 of Treasury Decision 3138. (See Internal Revenue Bulletin No. 4 for June, 1921, at page 238.) The opinion of the Attorney General of February 26, 1921, is quoted in full as part of Treasury Decision 3138 in the appendix to this brief.

Community Property taxpayers in all of the States except California have been filing separate income tax returns ever since the date of the decision down to the present time. The Department never questioned the soundness of the opinion of the Attorney General from a legal standpoint and did not request the Attorney General to permit test suits. On the contrary, the Department permitted the filing of separate returns in the Community Property States, in accordance with the regulations and opinions in effect, and recognized that the opinion construing the Act of 1918, and prior acts, as well as the Treasury Decision, was a correct interpretation and decided that if Treasury Decision 3138 could be avoided at all, it could only be done by procuring special legislation by Congress specifically requiring the husband to return, in his *individual* income tax return, the entire community property income.

Revenue Act of 1921.

Without obtaining an opinion from the Attorney General as to the constitutionality of such special legislation, the Treasury Department, in order to avoid the law as it existed and as it had been interpreted in Treasury Decision 3138 and the opinion of the Attorney General, recommended to Congress that

the Revenue Law be changed; and the bill which later became the Revenue Act of 1921, as sent to the Senate by the House of Representatives, accordingly provided that:

> "Income received by any community shall be included in the gross income of the spouse having the *management* and *control* of the community property." (Italics ours.)

The amendment quoted above and sponsored by the Treasury Department was adopted by the Ways and Means Committee of the House of Representatives without an open hearing and was passed by the House without discussion. The Senate Finance Committee proposed that the final words be changed so as to read "of such community property," and that there be added the words "and shall be taxed as the income of such spouse."

The Amendment we have quoted was intended to overturn, in specific terms, the opinion of the Attorney General and the existing decision and rulings of the Treasury Department and was a direct attempt by the Treasury Department to write into the Revenue Act of 1921 exactly what the Government is now contending the Revenue Act of 1926 means without the amendment. The amendment was vigorously opposed by numerous senators on the floor of the Senate. (See later reference to Congressional Record.)

The opinion of Attorney General Palmer of February 26th, 1921, was submitted to the Senate and printed in the Congressional Record. Briefs were also filed and printed in the Congressional Record and arguments against the amendment were made on the

floor of the Senate by Senators Broussard, Ashurst, Jones of New Mexico, Jones of Washington, Ransdell, Borah, Poindexter and others.

In the discussion and argument, the fundamental and practical features of the community property laws were pointed out in detail and the amendment was attacked by many Senators on the floor as being unfair and as discriminating against the community property States. The arguments cover many pages of the Congressional Record.

As a result of the opposition to the amendment proposed by the Treasury Department, an amendment introduced by Senator Broussard, striking out the objectionable clause in the bill, was unanimously adopted and the community property amendment was eliminated from the bill. (Vol. 61, Congressional Record No. 146 for November 3rd, 1921, pp. 8037, 8038). The House later concurred in the elimination of the provision in question by the Senate and the Act of 1921 was passed with the amendment of the Treasury Department eliminated from the bill.

The Treasury Department, having failed to persuade Congress to adopt the amendment we have discussed, which, if constitutional, would have overturned the existing rulings of the Attorney General and the decisions of the Treasury Department, continued to accept separate returns from husbands and wives in community property states, and the opinion of the Attorney General and the decisions and regulations of the Department, construing the Revenue Acts of 1921, 1918 and prior years, remained in effect and operation without a question being raised as to their legal validity and soundness. It is obvious that the De-

partment recognized that nothing could be done by it to deprive community property taxpayers of the rights given them by the existing opinion and Treasury Decision interpreting the Revenue Acts, unless affirmative legislation by Congress could be obtained changing the law and specifically taxing husbands on community income in community property states. Accordingly, nothing further was attempted to be done by the Department until the revision of the Revenue Act was proposed in 1924.

Revenue Act of 1924.

The Department in 1924 again attempted to have a provision, similar to the provision which had been rejected in 1921, inserted in the proposed new Revenue Act. The following amendment was proposed by the Treasury Department and was in the Revenue Act as submitted to the Ways and Means Committee of the House:

> "Income received by any marital community shall be included in the gross income of the spouse having the *management* and *control* of the community property and shall be taxed as the income of such spouse." (Italics ours.)

At the public hearing held by the House Committee on Ways and Means, representatives of taxpayers of the various community property states involved appeared and in oral, as well as in written, arguments filed with the Committee explained the community property system and the opinion of the Attorney General and the Treasury Decision and made the same arguments that were made when the amendment, in

substantially the same language, was proposed in 1921. It was urged that the adoption of such an amendment would be unfair and discriminatory and the opinion of the Attorney General and Treasury Decision 3138 were submitted to the Committee on Ways and Means showing the existing interpretation of the Revenue Act.

The lengthy arguments made, as well as the opinion of the Attorney General and Treasury Decision 3138, are printed in full in the Hearings before Committee on Ways and Means, House Reports, Revenue Revision 1924, pp. 194, 348, 375, 478, 482. The Committee, with all this information as to the existing interpretation of similar language contained in previous acts, the rulings and practice of the Department, as well as a full discussion of the merits of the situation, rejected the amendment proposed by the Treasury Department, and the bill was finally passed with the amendment eliminated, thus clearly indicating that Congress approved and sanctioned the existing rulings and practice adopted by Treasury Decision 3138 as well as the interpretation of the Revenue Act contained in the opinion of the Attorney General permitting husbands to make separate returns of community income in community property states other than California under the Revenue Act of 1924.

Revenue Act of 1926.

The Revenue Act of 1926 contains the same language already referred to under a previous heading of this brief as the Acts of 1918, 1921 and 1924. The similar language used in the preceding Acts of 1918, 1921 and 1924 had been uniformly and continu-

ously construed by both the Attorney General and the Treasury Department. The regulations of the Department construing these Acts had been in effect and operation since 1920 and were in effect and operation when the Revenue Act of 1926 was passed. Two amendments, attempting to amend the Revenue Acts of 1921 and 1924 and designed to overturn and change the meaning and effect of the Revenue Law as construed by the Attorney General and the Treasury Department, had been previously rejected. In short, the Act of 1926, containing language similar to that construed in the previous Acts, was reenacted in the light of the executive and legislative history we have previously outlined in detail, and, under familiar and well settled principles of law, the same practical intent is to be presumed from the adoption of the 1926 Act as in the case of the 1924 and 1921 Acts.

This Court has Repeatedly Held That in the Interpretation of a Doubtful or Ambiguous Statute a Uniform Executive Construction and Administrative Practice will be Given Great Weight, and that the Re-enactment of a Statute in the Same Language which has Previously Received a Long and Uniform Executive Construction Amounts to an Adoption of the Executive Construction by Congress.

We have shown that the literal interpretation of the plain language of each of the Revenue Acts from the original Act down to and including the Act of 1926, as well as the executive and legislative history construing these Acts is contrary to the contention of the government in this case as to the meaning and intendment of the Revenue Act. If we should as-

sume, however, for the purpose of argument, that the Revenue Act is ambiguous, then we would point out that this Court has often held that when the meaning of a statute is doubtful, great weight should be given to the construction placed on it by the Department charged with its execution, and that the re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction is an adoption by Congress of such construction. In this connection, Mr. Chief Justice Taft, in the case of *New York v. State of Illinois,* decided January 14, 1929 278 U. S. 367, said:

> "Nothing is more convincing in the interpretation of a doubtful or ambiguous statute,"

In *United States v. Cerecedo Hermanos y Compania,* 209 U. S., 339, this Court said:

> "We have said that when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the Department charged with its execution. *Robertson* vs. *Downing,* 127 U. S. 607; *United States* vs. *Healey,* 160 U. S. 136. And we have decided that the re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction. *United States* vs. *Falk,* 204 U. S. 143, 152.
>
> "Judgment reversed.
>
> "Mr. Justice White and Mr. Justice Peckham concur solely because of the prior administrative construction."

It is to be noted that in the above case Mr. Justice White and Mr. Justice Peckham evidently did not

agree with the construction previously placed upon the statute by the Department, but felt constrained, in view of the well established rule, to hold, that in view of the re-enactment of the statute without change, Congress had adopted the Department's previous construction of the statute.

In the case of *United States vs. Johnston,* 124 U. S. 236, cited by Mr. Justice Holmes in the case just quoted from, Mr. Justice Harlan rendered the opinion of the court, and said:

> "In view of the foregoing facts the case comes fairly within the rule often announced by this court that the contemporaneous construction of a Statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous."

In the case of *Copper Queen Mining Co. v. Arizona Board of Equalization,* 206 U. S. 474, Mr. Justice Holmes said:

> "And again, when for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed, that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed. * * * Even apart from the re-enactment a certain weight attaches to this fact. *U. S.* v. *Finnell,* 185 U. S. 236, 243; *U. S.* v. *Sweet,* 189 U. S. 471."

In *National Lead Company v. United States,* 252 U. S. 140, it is stated:

> *"The re-enacting of the drawback provision four times, without substantial change, while this method of determining what should be said under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute. United States v. Philbrick, supra; United States v. C. Falk & Brother,* 204 U. S., 143, 152; *United States v. Cerecedo Hermanos y Compania,* 209 U. S. 337; *for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government. United States v. Bailey,* 9 Pet. 238, 267."

In the case of *Komada & Co. v. United States,* 215 U. S. 392, it was held that a classification by the Revenue Department of a dutiable article under the Tariff Act was of controlling effect, especially after the law had been re-enacted without change as to the basis of classification.

In the case of *United States v. C. Falk & Bro.,* 204 U. S. 143, the departmental construction relied on had been based on an opinion furnished by the Attorney General, and the court, speaking through Mr. Justice McKenna, said:

> "And the Attorney General's opinion cannot be overlooked. The proviso which he construed in Section 50 of the Act of 1890 was re-enacted in Section 33 of the Act of 1897. It would be extreme to hold that Congress, by doing so, intended to set up the technical rule relating to provisos against the construction of the Attorney General and to change that construction by repeating the very words construed. And there could have been no oversight. The practice of the executive officers for years gave emphasis

> and materiality to the construction. * * * This, then, is our view: The Attorney General having construed the proviso of Section 50 of the Act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of Section 33 of the Act of 1897." (Italics ours.)

The most recent assertion of this doctrine is in the decision of this court dated May 26, 1930, in the case of *United States of America v. James E. Farrar,* 281 U. S. 624. This case involved the question as to whether or not the prohibitions and penalties of the National Prohibition Act apply to a purchaser of liquor. Although Section 6 of the Act provided that no one should purchase any liquor without first obtaining a permit and although there are no express words in the Act exonerating a purchaser from liability under the penalties thereof, yet the court by unanimous opinion held that the indictment charged no offense because of the legislative and executive history of such provisions under which purchasers have not been considered as being guilty of the offense. The language of the Act was clearly ambiguous and this court concluded its opinion with the following significant sentence:

> "If aid were needed to support this view of the matter, it would be found in the fact, conceded by the government's brief, that during the entire life of the National Prohibition Act, a period of ten years, the executive departments charged with the administration and enforcement of the act have uniformly construed it as not in-

cluding the purchaser in a case like the present; no prosecution until the present one has ever been undertaken upon a different theory; and Congress, of course well aware of this construction and practice, has significantly left the law in its original form."

To the same effect are *Brewster v. Gage*, 280 U. S. 327 (1930); *United States v. Sweet*, 189 U. S. 47; *Heald, et al., Committee of the Person and Estate of Peters v. District of Columbia*, 254 U. S. 20; *N. Y. N. H. & H. R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361; *United States v. Finnell*, 185 U. S. 236; *United States v. Philbrick*, 120 U. S. 52; *United States v. Alabama Great Southern R. R. Co.*, 142 U. S. 216; *Edwards v. Darby*, 12 Wheat. 206.

We have seen from the executive and legislative history of this controversy that in 1920 and in 1921 an Attorney General's opinion was rendered and promulgated interpreting the Revenue Act of 1918 and prior Acts as permitting husbands and wives to make separate income tax returns, and to report in their returns the community income of each as defined and fixed by the laws and decisions of the State in which they were domiciled; that these opinions were promulgated, and Treasury decisions and regulations, as a result of the opinions, were adopted and have remained in effect and operation from 1921 until after the adoption of the Act of 1926, without being questioned, qualified or withdrawn, during which time there were three revisions of the Revenue Act, one in 1921, one in 1924 and the last in 1926; that in 1921 and 1924 Congress rejected amendments designed expressly to overturn the existing construction and rule of the Department. Congress, in the light of and with *actual knowledge* of the executive and depart-

mental construction and administrative history of the previous acts already referred to, re-enacted the law three times without change. In none of the cases we have cited is there presented so strong a situation as we have in the instant case.

The Government's Contention that "Control" and not "Ownership" is the Test of Income Taxation Under the Revenue Act of 1926 is Inconsistent with and Contrary to the Last Opinion on this Subject Rendered by Then Acting Attorney General William D. Mitchell, on July 16, 1927 (after the Robbins Case Dealing with the California Law, was Decided), in which Opinion it was Ruled that the Revenue Act of 1926 Intends to Tax a Husband and Wife on the Income of Each to be Determined by the Statutes and Decisions of Each State.

It is submitted that the Government's contention in relation to the interpretation of the Revenue Act of 1926 is inconsistent with the opinion of then Acting Attorney General Mitchell, rendered July 16, 1927, in which the meaning and effect of the Revenue Act of 1926 and the *Robbins* case were carefully considered and these various test suits suggested. Mr. Mitchell, after discussing the *Robbins* case and the laws of the other Community Property States, suggested that test suits be arranged to determine whether the laws of the other Community Property States were sufficiently different from the laws of California to justify a change in policy on the part of the Treasury Department.

The portions of the opinion of Acting Attorney General Mitchell addressed to the Treasury Depart-

ment, pertinent to the discussion under this heading of our brief, are as follows:

"Department of Justice,
July 16, 1927.

"Sir: Under date of February 3, 1926, you asked me to reconsider two opinions of the Attorney General, the first dated September 10, 1920 (32 Op. 298), and the second dated February 26, 1921 (32 Op. 435). These opinions deal with the nature of the wife's interest in community income under the systems prevailing in the States of Texas, Washington, Arizona, Idaho, New Mexico, Nevada and Louisiana, a list which includes all of the States excepting California in which any form of community property system is in force. In the earlier opinion it was held that in Texas the wife had such an interest in the community income as to entitle her to return half of it as her income under the Revenue Act of 1918. In the opinion of February 26, 1921, a similar conclusion was reached respecting the wife's interest in the community income under the systems prevailing in the other States mentioned.

"Your request for reconsideration followed the decision of the Supreme Court of the United States in the case of *United States v. Robbins,* 269 U. S. 315, decided January 4, 1926, in which it was held that the wife's interest in the community income under the system in force in California in 1918 was not substantial enough during the existence of the community to entitle her to separately return half of it as her income under the Revenue Act of 1918.

"*The questions involved are not matters of construction of the Revenue Acts of the United States, but involve the nature of the wife's interest in the community income.* The Revenue

Acts of the United States have been so drafted as to require the husband *to return and pay income taxes upon the community income if that income belongs to him, and to prevent the wife from returning a share of the community income as her own unless the share belongs to her. The nature and extent of a wife's interest in community income in any of these States is to be determined from the statutes and decisions of the State.* In determining the nature of an interest in community income created by State law, it is necessary for the Federal courts to accept the decisions of the State courts construing the statutes creating the interest and to determine from the statutes and decisions of the State courts the intrinsic nature of that interest. While the *adjectives* used by State courts in an effort to describe the nature of the wife's interest in community income are not necessarily controlling on the Federal courts as to the extent of the wife's interest, decisions of the State courts holding what rights of a proprietary nature the wife may exercise in respect of community income are binding on the Federal courts. I have made these observations to show that it has been necessary, as the result of your request, to make a very exhaustive examination of the statutes and decisions of the seven States mentioned relating to community property. This laborious task was undertaken with the expectation of reaching conclusions on the law which might be expressed in response to your request for reconsideration, but the result has led me to the conclusion, which possibly I might have anticipated at the outset, that the problems presented can not be settled by any opinion of the Attorney General and that the situation makes it inappropriate under established precedents for me to express my conclusions. * * * "

"My predecessors have refrained from render-

ing opinions on questions pending in the courts for decisions and have frequently refrained from expressing opinions where it is evident that the matter is known to be the subject of judicial decision in the immediate future. * * *

"The decision in the case of *United States v. Robbins, supra,* dealing with the California system, does not necessarily dispose of the problem in the other States in which some forms of the community property system are in effect. In that case the ultimate inquiry was to the extent to which, under the statutes and decisions of California, the wife could exercise rights of ownership over a share of the community income. The same problem arises in each of the other States above mentioned. There are very substantial differences between the so-called community property system in these various States. No two of them are just alike. Some resemble very closely the system in California dealt with in the *Robbins* case, but in other States the systems differ very considerably from the California system. In some of the States the extent of the wife's proprietary interest or ownership in community income derived from one source differ from that in community income derived from other sources. * * *."

"While I have acquired opinions on the subject as a result of the examination of the statutes and decisions of these States and the proper answer to the questions involved may be more evident as to some of the States than as to others, I believe for the reasons stated that it would be inappropriate and ineffective for me to deal with the subject in an opinion with a *view to having your regulations and methods of dealing with community income changed.* The answers to the questions involved are not so obvious as to make it clear what conclusions the courts may reach. To overturn by administra-

tive actions and in reliance on an opinion of the Attorney General the method of dealing with community income which has prevailed in seven States, with the possibility that, in the end, the courts would not agree with our views, would produce the utmost confusion and create an intolerable situation.

"On the other hand, so long as the former opinions referred to are allowed to stand, they interfere with your taking any steps to have these questions determined in the courts, and it must be admitted that the decision in *United States v. Robbins* has raised very substantial doubts as to the soundness of the two opinions.

"*The questions involved are not such as may appropriately be set at rest by congressional action. As the nature and extent of the wife's interest in community income are matters determined by the laws of the States, Congress may not by any enactment change the nature of the wife's interest;* and as the problem involved is not one of construction of the Revenue Acts of the United States, the rule that re-enactment of a statute after an administrative construction of it is legislative adoption of the construction, has no application to this case.

"For these reasons I feel constrained to, and do now, withdraw the two opinions referred to in order to leave you free, as has been done in similar situations, to arrange for test cases in the courts or otherwise deal with the matter as you may think proper.

Respectfully submitted,

WILLIAM D. MITCHELL,
Acting Attorney General."

As the foregoing quotations show, Attorney General Mitchell construed the *Robbins* opinion only as "raising doubts" as to the correctness of prior rul-

ings of the Attorney General and the Treasury Department as to the *local law* of the other community property states with reference to the wife's ownership in half the community income under the applicable local law. No suggestion was made by Attorney General Mitchell or by the Treasury Department that the *Robbins* decision should be taken as introducing a new theory of statutory construction of the Federal Revenue laws so as to set aside and make irrelevant the wife's ownership in community income and determine taxation only by reference to the husband's control of income actually belonging to the wife. It was not until the arguments in the present test cases that the Government advanced the theory that the effect of the *Robbins* decision was to establish as a matter of statutory construction an entirely new rule for the application of income taxes based not upon ownership but upon control.*

*In the foregoing discussion of the Revenue Act of 1926 no reference has been made to Section 1212, for the reason that it is conceded by all parties that this Section was simply a quieting statute governing past years and has no application and was not intended to have any bearing whatever upon future years or the issues presented in this case. See statement made in the brief of the Government in *Poe vs. Seaborn*, No. 15, page 9, footnote, where, after reference to the opinions of the Attorney General holding that a husband and wife domiciled in the States of Washington, Texas, Louisiana, Arizona, Nevada and Idaho were entitled to divide the community income in separate returns while a similar privilege was denied to married taxpayers domiciled in California, it is said:

> "This procedure was subsequently given retroactive legislative approval as to 1925 and prior years by Section 1212 of the Revenue Act of 1926, *infra*. That Section was not intended to apply to taxes for subsequent years and has no bearing on the question here involved."

See also the brief of Mr. Mitchell, as Solicitor General, in the case of *Zemurray vs. United States*, reported as 278 U. S. 600.

POINT III.

THE DECISION OF THE SUPREME COURT IN THE CASE OF *UNITED STATES V. ROBBINS*, INVOLVING THE LAW OF CALIFORNIA, IS NOT APPLICABLE TO THE LAWS OF OTHER COMMUNITY PROPERTY STATES AND DOES NOT SUPPORT THE GOVERNMENT'S CONTENTION THAT CONGRESS INTENDED TO TAX ALL COMMUNITY INCOME IN OTHER STATES TO THE SPOUSE HAVING CONTROL OF THE RECEIPT AND ADMINISTRATION AND DISPOSITION THEREOF.

(a) The Robbins Case Deals only with the Local Law of California, and the Underlying Theory of the Decision is that under the Decisions and the Statutes of California, the Husband is in Law the Owner of All of the Community Property and Income, and Possesses All of the Substantial Attributes of Ownership.

It will be helpful to review briefly the circumstances under which the *Robbins* case arose and was decided. We have already called attention to the fact that in the opinion of Attorney General Palmer in 1921, he interpreted the Revenue Act of 1918 and prior Acts as taxing husbands and wives in community property states on the share of the community income, which under the local state law belonged to each spouse. The conclusion was that in all of the states except California, the wife had, under the local state statutes and decisions a vested one half ownership in the community income as it accrued. In California, however, the wife's interest

was not *vested*, but was only that of an "expectant heir," and he accordingly held that California husbands and wives were not entitled to make separate returns as in the other community property states.

The California citizens were not satisfied with the Attorney General's interpretation of their local law and decisions and took the matter to the courts. A test suit was instituted in behalf of a certain Robbins of California, in an effort to have the United States Supreme Court recognize that in California under the local law and decisions, the wife had a vested ownership in community income as in the other community property states, so that California would benefit by the existing rulings and decisions of the Treasury Department in this regard. The Government contended in the suit that under the California statutes and decisions, as distinguished from the statutes and decisions of the other community property states, the wife had not a substantial vested ownership in community income but "a mere expectancy."

The Supreme Court sustained the contention of the Government, and it was held that the citizens of California were not entitled to the benefit of the community property rulings for income tax purposes that were applicable to the other community property states. This decision was clearly correct because of the substantial difference between the California law and that of the other community states. The court, however, after deciding the question as to whether the wife's right in community income was vested or amounted to a mere expectancy, which was considered by counsel on both sides to be the sole issue in the case and which was sufficient to dispose of it,

went further and used language in the last paragraph of its opinion which the Government's attorneys now contend is to be taken as indicating that because of the husband's control and administration as managing partner over the community property income in states where (unlike California) the wife's vested ownership in the community property has always been recognized, Congress not only had the power to tax the entire community income to the husband, but had indicated an intent to do so.

It is important to note that the questions discussed in the last paragraph of the *Robbins* case were not contended for or even suggested by the Government, either in its brief or in oral argument in that case. Both the Government and the California attorneys admitted, as the Treasury Department and the Attorney General had ruled for many years, that the sole question at issue in the case was whether or not the wife had a one-half vested ownership in the community property income under the law and decisions of California, and that the right to make separate returns under existing rulings and decisions depended entirely on the decision of the court on this point alone.

The questions suggested in the last paragraph of the decision were not contended for by the Government, and were assumed by all parties to the case to be clearly settled in the light of the language of the various Revenue Acts as well as the previous executive and legislative interpretations and history of the construction of the Revenue Acts. Counsel for neither side emphasized the literal construction of the Revenue Act upon its face, or the executive and legislative history of the community property controversy, which

would have shown the court that Congress had twice rejected two amendments attempting to tax husbands on the entire community income, irrespective of the question of ownership. In short, the court did not consider the legislative history in relation to the question of statutory construction, nor any contention that "control" rather than "ownership" should be the test of taxability.

The court in the last paragraph of the *Robbins* case stated in substance that the wife's interest was so insubstantial, and the power and control of the husband over the community property was so unlimited that the husband was not only technically and legally the owner of all of the community property under the California law, but was also, in fact and in substance, the real owner. It was discussing the California law throughout, and after referring in the first paragraph to the decisions of the California Supreme Court defining the wife's interest as a "mere expectancy," then proceeded in the second paragraph of the opinion, to analyze the attributes of ownership as fixed by the local California statutes and decisions, and concluded that the wife had none of the real attributes of ownership, but, on the other hand, unlimited control and all of the attributes of ownership were vested in the husband, and that accordingly the Revenue Act "intended to tax him for the whole."

The opinion was fitted peculiarly to the California situation, and was not intended to apply to community property systems radically different from the California system of laws. In short, the *Robbins* case held that the wife's interest in community income under the California law was so shadowy and insubstantial that Congress intended to impose the tax

upon the husband because he was, both under the California law and in substantial fact, the real owner of it.

(b) The Reasons Presented in Support of the Conclusions Reached in the Last Paragraph of the *Robbins* Case are at Most Reasons and Arguments Why Congress had the Power to and, as Matter of Legislative Policy SHOULD Tax Husbands in States having Community Laws Similar to California on the Entire Community Income, Including the Portion of the Community Income in Which the Wife Has Only an Expectant Interest Similar to Her Interest in California; and do not Show That Congress Actually INTENDED to Use or Actually Did Use Language Taxing Husbands in Other States on the Portion of the Community Income in Which Under the Local Law, the Wife has a Present and Substantial Ownership at the Time it Accrues.

In the first paragraph of the *Robbins case*, dealing with the real issue presented and argued by counsel as to whether the wife had a substantial vested interest in community income under the laws and decisions of California, the Court said:

> "Elaborate argument was devoted to the question whether the interest of a wife in community property has the *relatively substantial* character in California that it has in some other States. That she has vested rights has been determined by this court with reference to some jurisdictions. *Warburton v. White*, 176 U. S. 484; *Arnett v. Reade*, 220 U. S. 311.
>
> * * * * * * * *

> "We can see no sufficient reason to doubt that the settled opinion of the Supreme Court of California, at least with reference to the time before the later statutes, is that the wife had a mere expectancy while living with her husband. The latest decision that we have seen dealing directly with the matter explicitly takes that view, says that it is a rule of property that has been settled for more than sixty years, and shows that *Arnett v. Reade,* 220 U. S. 311, would not be followed in that State. *Roberts v. Wehmeyer,* 191 Cal. 601, 611, 614."

It will be noted from the above quotations that the decision recognized that the wife had vested rights in community property in some jurisdiction, and specific reference is made to two decisions of this court to support this proposition. (*Warburton v. White,* 176 U. S. 323, and *Arnett v. Reade,* 220 U. S. 311). In fact, these decisions were in part the basis of the opinions of the Attorneys General heretofore referred to. The Court, it is to be noted, does not indicate that there is any reason whatever to doubt the soundness of the rule previously announced with reference to the wife's vested interest in some of the other community property States. It holds that the law and decisions of California, however do not recognize such a vested interest in the wife, and that it is clear that *Arnett v. Reade,* holding that the wife had a vested interest in community property in the State of New Mexico, under the local statutes and decisions, "would not be followed in California" by the California courts. The Court clearly implies that the question of vested right is dependent solely upon State laws and decisions and accordingly announced that under the law of California, a wife did

not have a vested right as was the case in some of the other community property states.

The Court, however, goes further in the second paragraph of the decision and raises questions with regard to the *power* and intent of Congress. The paragraph is very brief and reads:

> "Even if we are wrong as to the law of California and assume that the wife had an interest in the community income, that Congress *could* tax if so minded, it does not follow that Congress *could* not tax the husband for the whole. Although restricted in the matter of gifts, etc., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See *Garrozi v. Dastas*, 204 U. S. 64. His liability for his wife's support comes from a different source, and exists whether there is community property or not. That he *may be* taxed for such a fund seems to us to need no argument." (Italics ours.)

It is clear from the above quotation, that the Court was, at this point, discussing only the *power* of Congress to tax a California husband on income in which the wife had an interest not more substantial in character than she possessed in California in *view of the fact he alone had disposition of the fund.*

The Court outlined various rights of the husband under the law of California, with reference to the community property as reasons why Congress had the *power* to tax the husband for the wife's property. But the reasons thus given by the Court, leading to the conclusion that Congress had the *power* to tax the husband for the whole community income, are not in any sense reasons to support

the argument that Congress *intended* to or *actually* did tax the husband on the whole income in any of the Revenue Acts, including the Act of 1926.

The question of *power* suggested by the Court would have been squarely raised if Congress in 1921 or in 1924 had adopted the amendments suggested by the Treasury Department, which in express language, imposed a tax on the husband having the control and administration of the community property, irrespective of any question of community ownership. These amendments, it will be remembered, were both rejected by Congress. It must, we think, be admitted, therefore, that logically the various enumerations of the laws of California set out by the Court are at most reasons why Congress *should*, or as the opinion put it, *could*, pass appropriate legislation taxing the husband on the entire community income if Congress so desired, but are in no sense reasons in support of a present interpretation of the Revenue Law that Congress has actually indicated such an intention.

The next two sentences of the *Robbins* opinion read as follows:

> "The same and further considerations lead to the conclusion that it was intended to tax him for the whole. For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code Section 167, so that the remedy for her failure to pay might be hard to find."

Thus, after giving reasons based on an enumeration of the laws of California as to why it thought Congress had the *power* to tax the husband for the

whole, the Court said: "The same and further considerations lead to the conclusion that it was intended to tax him for the whole." The reasons given in the preceding quotations are along the same lines as the reasons given in support of the *power* of Congress to tax the husband for the whole. But the considerations which support the conclusion that Congress *could,* under the Constitution, impose on the husband a tax on the wife's half interest in the community, would not be sufficient to demonstrate that Congress *had in fact* undertaken to so tax the husband. The "further considerations" referred to by the Court, are relevant, not to the questions as to which alternative Congress *actually chose,* but to the wisdom and policy of choosing one way rather than the other. *They do not deal with the question of actual intent as shown by the language of the Revenue Act or with the question of actual intent as shown by the meaning and definition of the word "income" in the Constitutional Amendment, and it is important to note that the court makes no reference to the language either of the Revenue Act or of the Constitution.* We may say, parenthetically, at this point, that the reasons advanced in the *Robbins case* as showing that it would be wise policy to tax the husband for the whole of the community property, were substantially the same reasons presented to Congress by the Treasury Department in support of the Amendments proposed in 1921 and 1924 already referred to, and these two Amendments, it must be remembered, were rejected because the reasons advanced by the other community property states against their adoption based on the practical aspects of the laws of the community property states other than California,

convinced Congress that it was unfair and unwise to tax the husband for the whole of the community income.

The Court in the *Robbins* case concludes its reasons in support of the advisability of taxing the husband for the entire community income irrespective of the wife's expectant ownership of half of the income as follows:

> "The reasons for holding him (the husband) are at least as great as those for holding trustees in the cases where they are liable under the law."

The above statement is another suggestion possibly relevant to the question of the *power* of Congress as well as the policy and desirability of Congress taxing the husband for the whole community income in community property states. It cannot, however, in any sense be contended that it is an additional reason supporting the proposition that Congress *actually did* bring about this result and that the Revenue Act of 1918, as well as subsequent Acts can be interpreted as showing an intent on the part of Congress to tax the husband as an individual on the entire community income. We have already, under a previous heading of this brief, pointed out that the Community Partnership is not described under the heading "Trusts" in the Revenue Act, and at this juncture, we desire to again emphasize that the analogy suggested by the Court although it may logically indicate that Congress *could*, as a matter of constitutional power, treat husbands as trustees of the wives' one-half of the community income in community property states, does not support the

argument that Congress *has* actually described and included husbands in such a definition. Finally, if the analogy of the trustee were logically applied to the Community Property Law where the husband is master and managing partner of the marital partnership, the only inference warranted would be that the husband, as a quasi trustee of the half of the community income and property belonging to the wife, should, as such quasi trustee, make a separate report and pay a separate tax on such income. The trust analogy, however, would not possibly justify the conclusion that the husband should include in *his personal return* the separate income from his wife's half of the community property which he held only as quasi trustee.

The final opinion by Acting Attorney General Mitchell in 1927 on this subject states that the real point in issue in the *Robbins* case was whether or not the wife under the statutes and decisions of California had a real and substantial ownership in the community property. The enumeration of the husband's rights in the closing part of the decision showed that the respective rights of the husband and wife in the property were not out of harmony with the California decisions which held that she had merely an expectancy. In other words, the court having found that the California decisions interpreted the law of that state as giving the wife merely an expectancy, it was pertinent for the court to point out that the rights of control which could be exercised by the husband under the California law were not inconsistent but rather affirmed the California court holdings that the only interest of the wife was an expectancy. Certainly there is no express lan-

guage in the decision to justify the contention now made by the government for the first time that this court intended to set forth a new rule of statutory construction to the effect that control rather than ownership was the test to determine whether or not an individual should pay taxes levied under the Revenue Acts. In the first part of the opinion the court recites that the Treasury Department had made a distinction between the law of California and that of the other community states and it was therefore in order to enumerate the broad rights of control by the husband in California which justified the distinction theretofore made by the Department. In fact, in the brief of the government in the *Robbins* case, there was such an enumeration which *contrasted* the rights of the husband and wife in California with those in the other community states.

POINT IV.

THE DECISIONS IN CORLISS V. BOWERS AND LUCAS V. EARL, CITED IN THE GOVERNMENT'S BRIEF, ARE NOT APPLICABLE TO THE ISSUES INVOLVED IN THESE CASES.

In *Corliss vs. Bowers*, 281 U. S. 376, the court was dealing with Section 219 of the Revenue Act of 1924 which expressly provided that where the grantor of a trust had at any time during the taxable year the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year should be included in computing the net income of the grantor. This new provision of the revenue law was inserted as a clear exception to the general rule and history of the Revenue Act taxing "individuals" on the basis of

ownership of income as determined by state law. This amendment specifically taxing the donor of a revocable trust was designed to meet a particular situation, *i. e.*, to prevent individuals from establishing revocable trusts in favor of the members of their families and their friends in order to reduce income taxes, which was formerly done under the law as it had previously existed. No question was open as to the intent of Congress which was clearly expressed and the only point for argument was constitutional power. The court upheld the statute on the ground that

> "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income whether he sees fit to enjoy it or not."

In the present case the executive and legislative history of the Revenue Acts negative any intent of Congress to tax the community income entirely to the husband because of his powers of management and control. Congress, in fact, has twice rejected amendments which were expressly designed and worded to bring about this result.

Furthermore, the reasoning in the *Corliss* case with reference to the constitutional question involved is inapplicable to the present cases, because the husband in Louisiana, Texas, Washington and Arizona has not the "unfettered command" of the community income, but, on the contrary, is analogous to a managing partner, agent or trustee, as pointed out in the original briefs filed in these cases discussing the Community Property Laws of Louisiana, Washington, Texas and Arizona.

In *Lucas vs. Earl,* 281 U. S. 111 (1930), the salary and attorneys' fees were earned by the husband and under the law of California were owned by him. He attempted by special contract with his wife to procure a different result. It was held that as the salary vested in him when it was earned, it was all taxable to him and this result would not be prevented by a contract requiring him to share it with his wife *after* it had accrued. In the present case, the wife's interest in the community income vested from the moment of its accrual. From that moment, the husband's dealings with it were subject to the limitations already fully set forth. There was never a moment when the income vested in the husband free of those limitations. Moreover this result flowed from the ~~Louisiana~~ local law and not from any special contract.

We direct the court's attention also to *Shellabarger v. Commissioner of Internal Revenue,* 38 F. (2d) 566, (C. C. A. 7, 1930), holding that income is taxable to the person to whom it accrues or belongs and not to the person who happens to receive it. So in these cases the fact that all of the income may be received in the first instance by the husband does not indicate that it is all taxable to him, for half of that income accrues and belongs to the wife and can be taxed only to her.

POINT V.

THE CONTENTION OF APPELLANT THAT THE REVENUE ACTS IMPOSE INCOME TAX UPON ONE INDIVIDUAL AS AN INCIDENT TO HIS CONTROL OF THE INCOME VESTED IN ANOTHER INDIVIDUAL UNDER THE APPLICABLE LAWS OF THE STATES MUST BE REJECTED BECAUSE SUCH CONSTRUCTION WOULD RENDER THE STATUTE UNCONSTITUTIONAL IN THAT

(a) **It Would be in Part a Direct Tax, Not Based on Income of the Person Taxed and Not Apportioned;**

(b) **It Would Result in a Tax Not Geographically Equal and Uniform; and**

(c) **Such a Basis Would be so Arbitrary and Capricious as to Constitute Taking of the Property Without Due Process.**

It must be borne in mind that in each of the four states in question, under the settled laws of such states, one half of the community property actually vests in the wife and one half in the husband and that this vested right has heretofore been recognized by this court in *Warburton v. White,* 176 U. S. 484, and *Arnett v. Reade,* 220 U. S. 311. Also under the laws of each state one half of the community income vests in each spouse as it accrues. In no two states are the statutory provisions as to the control of the joint property or joint income identical, but in all of them there are certain limitations upon the control, certain divisions of the right of control and each spouse has the absolute right to devise or bequeath the share of the estate belonging to such spouse independent of any action by the

other. The co-equal interest of one spouse is, in practically all cases, inseparably affixed to that of the other. This is particularly important in dealing with the proposition that the tax as laid upon appellee must fail because it is a direct tax, not based on income and not apportioned.

In considering any statute the court will avoid any grave doubt as to its constitutionality. This does not mean that the court will first determine that a particular construction is unconstitutional and then reject it, but it means that if there is grave doubt as to constitutionality, the construction will be avoided. This proposition has been frequently stated in varying ways. Mr. Justice Holmes said in a similar case that:

> "It is enough—to point out that at least there would be very serious questions to be answered before Mrs. Frick and Miss Frick could be made to pay a tax upon the transfer of his estate by Mr. Frick." *Lewellyn v. Frick*, 268 U. S. 238.

In the same case the Court said that it did not propose to discuss the limits of the powers of Congress in cases of that character.

In *United States v. Jin Fuey Moy*, 241 U. S. 394, 401, the Court said:

> "A Statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

In *U. S. v. Delaware & Hudson Company*, 213 U. S. 366, 408, it is said:

> "Unless this rule be considered as meaning that our duty is to first decide that a statute is

> unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly means that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided—, our duty is to adopt the latter. *Harriman v. Interstate Commerce Commission,* 211 U. S. 407."

See also *U. S. v. Walter,* 263 U. S. 15; *The Abby Dodge,* 223 U. S. 166, 172; *Home Savings Bank v. Des Moines,* 205 U. S. 503.

Does grave doubt exist in this case?

Unconstitutionality was one of the reasons urged upon Congress when it refused to modify the 1921 law to expressly include community income as taxable to the husband. In his brief in the Supreme Court in the *Robbins* case, the present Attorney General, Mr. Mitchell, said, page 6:

> "The United States could not lawfully compel the wife to pay an income tax on any share of the community income because it is not hers but is the income and property of her husband."

And on page 58:

> "If the United States by statute should attempt to compel the wives of California to return as their own a share in the community income under this system, and attempt to render the wife personally liable for an income tax on that share, its validity would have to be denied on the ground that wife has no real interest in the income and she cannot be rendered personally

liable for the income tax on her husband's income."

If Mr. Mitchell was right in his legal conclusion as to the want of power of Congress to make a wife pay a tax on a part of her husband's income—and we think he was right in so saying—can Congress make a husband pay taxes on his wife's income?

That lack of constitutional uniformity might result from failure to recognize ownership is frankly suggested in Mr. Mitchell's opinion to the Treasury Department dated July 16, 1927, where it was said in part:

> "If it be the fact that in some or all of these states in which a community property system prevails, the wife has no real ownership in community income during the existence of the community, an attempt by Congress to allow wives in those states to return part of the community income as their own, while in those states not having a community property income, wives are not allowed to return any part of their husband's income, would raise a serious question under the uniformity provision of the Constitution of the United States."

Certainly we are not alone in thinking that grave constitutional questions will have to be decided if the system of taxation employed by appellee is held to be required by the terms of the Statute. Bearing in mind this most important rule of statutory construction, and the fact that the present head of the Department of Justice has expressed views in accord with ours, we ask the Court to consider the merits of the constitutional questions which will be next discussed.

(a) It Would be in Part a Direct Tax Not Based on Income of Person Taxed and Not Apportioned.

All direct taxes, save and except those upon income, must be apportioned. The Sixteenth Amendment did not extend the taxing power of Congress but only relieved it from the necessity of apportioning taxes levied upon income. *Eisner v. Macomber,* 252 U. S. 189. It will also be conceded that Congress cannot, by any definition which it may adopt, make something taxable as income which is not within the purview of the term "income" as used in the Sixteenth Amendment. So our inquiry is, whether or not any portion of the tax exacted from the husband was not on his income, in the constitutional sense, and if not, whether it is, nevertheless, a direct tax.

We submit that the tax upon one-half of the amount fixed by appellant is not on the income of the husband because he did not own it. It belonged to his wife. That ownership is the basis of income in the constitutional sense, is certainly the ordinary conception and is the usual basis of taxation:

> "With respect to taxation, usually, if not necessarily, property and its owners are inseparable." *Homes Savings Bank v. Des Moines,* 205 U. S. 503.

Income is—

> "The gain derived from labor, from capital or from both combined, provided it be understood to include a profit gained through the sale or conversion of capital assets." *Eisner v. Macomber,* 252 U. S. 189.

How that which one does not own, which one cannot deal with as an absolutely free agent, which one cannot bequeath, can be considered his gain or profit, cannot be explained unless we revise our accepted meanings, not only of income but of the more ordinary words "gain" and "profit." It would be equivalent to saying that sums received by a guardian for his ward, by a partner for his partnership, or by a trustee for his beneficiaries, constituted the gain or profit of the guardian, of the partner, or of the trustee alone, as to say that the entire sum of community gains received by a husband in his fiduciary and representative capacity is his gain.

We are not dealing here, or elsewhere in this brief, with the power of Congress to group husbands and wives together into taxable units as they have done under prior laws with partners or with unincorporated associations. This presents an entirely different question, and when such a law of general application is passed, it will be time enough to consider its validity.

Is such a tax a direct tax? We need only to consider so much of the tax in the present cases as is derived from real estate and invested in personal property. Rents and dividends make up part of the income in these cases. While in their original classification between direct and indirect taxes, direct taxes might have included only capitation taxes and taxes on lands and perhaps personal property, it has long since been settled that to tax the revenue from land or invested personal property is, in effect, to tax the property itself and that such a tax is sufficiently direct in its application and result to bring it within the classification of direct taxes.

Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 158 U. S. 601; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1. In effect the taxation of revenue from property or, in fact, the taxation of any unescapable incident connected with the use and ownership of property is a taxation of the property itself. It is the revenue or use which gives to property its value, which is, in substance, the property itself. This was the basis of the decision in the Pollock case.

Under the laws of each of the four states involved the husband cannot receive dividends from corporate stocks which are part of the community, he cannot receive rents and revenues from real estate owned during the taxable year without there arising and accruing to his wife an equal sum. The income tax levied by the government in these cases is not only based upon the husband's share of such rents, revenues and dividends but also upon that share vested in her which is not income to him and not an incident to property owned by him.

There is in the present case an unavoidable demand, referred to in *Thomas v. U. S.*, 192 U. S. 363, 371, which is based upon something absolutely indispensable to any effective enjoyment of ownership, making it a direct property tax (see *Dawson v. Kentucky Dist. Corp.*, 255 U. S. 288) and so much of this basis as belongs to the wife is not appellee's income; the tax to that extent fails because exacted in a manner contrary to the Third clause of Section Two of Art. I, and the Fourth clause of Section 9 of Art. I of the Constitution.

(b) It Would Result in a Tax Not Geographically Equal and Uniform.

In all other states, except these community property states, the laws of property and ownership are recognized in the imposition of federal income taxes as indeed they have been in these four states prior to the institution of these suits. In those other states a husband and wife are permitted to make separate returns of the income which, under their own laws, they own. Thus, tenancies in common by the entireties, partnerships between husband and wife, business arrangements not constituting partnerships, trust agreements and many other forms of ownership have been examined and where the wife was found to be the owner of all or a part of the income, she was permitted to return and pay taxes thereon. This privilege, which the Constitution places upon the law, appellant denies to citizens of these states. We have, therefore, the exact situation which the present Attorney General referred to in his last opinion upon the subject,—a lack of geographical uniformity required by Section 8 of Art. I, of the Federal Constitution.

It may be urged, in opposition to our views as to want of uniformity, that the want of uniformity is not geographical but that the varying incidence of the tax in the various states is produced by the different legal systems in vogue and not by any illegal discrimination among states, or sections in the Revenue Act itself, but such an argument overlooks the point heretofore made that in all of those other states their legal systems have been given effect and ownership as determined by the laws of such states recognized as the basis for the imposition of the tax and

that in no such state have husband and wife been required to combine, for income tax purposes, separately owned income. As construed and applied, such artificial and arbitrary discrimination amounts to putting pressure upon community property states to conform their legal systems with that of other states, or suffer improper, unequal and unjustifiable burdens.

There is the same want of uniformity, even if we were to concede that in these states dominion or control of income is the test of to whom it shall be taxed. This has not been done in the non-community property states. In short, however considered, the tax is laid upon one basis in these states and upon another basis in other states.

(c) Such a Basis Would be so Arbitrary and Capricious as to Constitute Taking of the Property Without Due Process.

It is now well settled that a taxing act can be so arbitrary and capricious in its application, so wanting in proper classification or basis, as to constitute the taking of property without due process of law, within the purview of the Fifth Amendment.

It is this precise defect—the measuring of tax liability by the property of some one else as well as the taxpayer—which has caused other taxing laws to be held wanting in due process; and this, although the others occupied the same, or almost as close a relation to the taxpayer as does the wife to the taxpayer in each of these cases.

In *Knowlton v. Moore*, 178 U. S. 41, the Supreme Court considered taxes on legacies and inheritance imposed by the War Revenue Act of 1898. Among

other questions presented was the validity of the construction urged by the Government to the effect that the taxes were laid upon each individual legacy or inheritance, but that the rate was to be measured to some extent by the size of the gross estate and not by the size of the legacy or inheritance received by the individual taxpayer. The Court held that the law should not be so construed, saying:

> "But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000, may be taxed, but the rate of tax is to be determined by attributing to A's house the value of B's house which may be worth a hundred fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated * * * It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person accompanied by an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising, from those fundamental conceptions of free Government which underlie all constitutional systems."

Again, in the case of *Lewellyn v. Frick*, 268 U. S. 238, the Government sought to measure the estate tax due from the estate of Henry C. Frick by adding to the value thereof the amounts of certain life insurance policies taken out by him on his life in favor of his wife and daughter. These policies were taken out long before the taxing act in question—the Revenue Act of 1918—was passed. That Act specified (Sec. 403) that there should be included in the gross estate:

"The excess over $40,000.00 of the amounts receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The Court says:

"The defendants in error say that if these policies are covered by the statute, these sections show that the beneficiaries are taxed upon their own property under the guise of a tax upon the transfer of his estate by Mr. Frick, and that this is taking their property without due process of law,—citing *Re Pell*, 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789, and other cases. In view of their liability, the objection cannot be escaped by calling the reference to their receipts a mere measure of the transfer tax. The interest of the beneficiaries is established by statutes of the states controlling the insurance, and is not disputed. It also is strongly urged that the tax would be a direct tax. In view of our conclusion it is not necessary to state the position of the defendants in error more in detail.

"We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. There would be another if the provisions for the liability of beneficiaries were held to be separable, and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind."

In the still more recent case of *Nichols v. Coolidge,* 274 U. S. 531, decided May 31, 1927, the Supreme Court in the strongest terms denounced and held invalid such a method of determining tax liability. On July 29, 1907, Mrs. Coolidge and her husband conveyed certain real estate in Boston to trustees, who were to hold the same, with power of sale, and reinvestment for the benefit of the settlers or the survivor of them for life, and the trustees were then to distribute the corpus of the trust to the five children of Mr. and Mrs. Coolidge. On the death of Mrs. Coolidge, January 6th, 1921, the trustees held property worth $432,155.35, but much of the original corpus of the trust, through sale and reinvestment, had passed from their hands. The Government based its estate tax exaction on the value of the estate of the decedent, plus the sum of the property held by the trustees and other property not here material, and the suit was to recover so much of the tax as was based upon this sum. The Court pointed out that the plain terms of the statute required the inclusion, thus preventing a construction which would avoid the constitutional question, that it was admittedly not passed to prevent evasion of death duties, but applied to transactions like the one under consideration, undertaken when there was no tax to evade. The opinion continued:

> "Certainly Congress may lay an excise upon the transfers of property by death, reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers, Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results. * * *

"The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them, but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?

"Undoubtedly Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity.

"Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testimentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves $10.00, both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Grew v. Bowers, Collector,* 12 Fed. (2) 625.

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber v. U. P. R. R. Co.,* 240

> U. S. 1, 24; *Barday & Co. v. Edwards*, 267 U. S. 442; see also *Knowlton v. Moore*, 178 U. S. 41, 77. And we must conclude that Section 402 (a) of the statute here under consideration, in so far as it requires that there shall be included in gross estate the value of property transferred by the decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after death is arbitrary, capricious and amounts to confiscation."

The cases of *Untermyer v. Anderson*, 276 U. S. 440, and *Blodgett v. Holden*, 275 U. S. 142, are other recent examples of taxation held in conflict with the Fifth Amendment because arbitrary and capricious.

The Supreme Court, in all of these cases, says in effect, that the house of A cannot be taxed upon a basis determined by the value of B's house; that such a tax is arbitrary, is capricious and amounts to confiscation. The holding is made despite the close relationship existing between the taxpayer and the person whose property is used as a measure of the tax. The situation is not changed because property, admittedly taxable, is used as a part of the basis. It does not save the situation to tax A upon the value of his house, plus the value of B's house. The latter must be entirely eliminated. Just as the Attorney General said in his brief in the *Robbins* case, the United States cannot compel the California wife to pay an income tax upon any share of the community income, because it was not hers, so we say that the Congress cannot lawfully compel the husband to pay an income tax on any part of the community income except his own, and it cannot compel him to pay on his own at higher rates, where the

laws of the state where he resides give his wife an equal ownership with him in the community property.

The foregoing argument as to constitutionality is based upon the proposition that this court will recognize that under the laws of the four states involved there vests in the wife one half of the community income in the taxable year 1927 as it accrued and that the Revenue Act of 1926 must be construed as taxing the husband upon a sum which results from combining the incomes of both husband and wife. The effect of the opinion is to greatly increase the tax on the aggregate income which tax is borne by the community estates of the husband and wife and to oblige the husband to pay the tax on both incomes as if the entire sum was his individual liability to the government and not a liability which was part his and part that of the wife. The constitutional power given Congress to tax, whether the taxation be direct or indirect, does not include the power to tax one person upon taxable property or taxable transactions of another person. To tax one person at progressive rates of taxation which are not based upon his own income but the sum resulting from adding to his income that which is vested in another effectively deprives the taxpayer of the property without due process of law. To tax husbands in community property states at progressive rates upon the sum of their income and the income of their wives while in other states husbands and wives are separately taxed upon the incomes vesting in each is such discrimination against husbands in community property states as to place upon them additional burdens beyond those laid upon husbands in other states and in violation of the Constitutional mandate that duties, imposts and

excises shall be uniform throughout the United States. If violation of Section 8 of Article 1 of the Constitution does not result from the foregoing hypothesis as to the entire income so taxed, nevertheless it must result as to so much of the income as is taxed indirectly in the form of an excise. If, under either hypothesis, the Federal Constitution is violated by such a construction of the Revenue Act, then such a construction must fall since it is not to be presumed that Congress intended to tax those incomes which are taxed directly by that Act and to exempt from taxation such incomes as are taxed indirectly by it. Since Congress has not undertaken by statute to define income but has merely taxed the income of each individual and has in fact rejected amendments offered which were designed to place such a construction upon the law, the conclusion is inescapable that no such result was intended.

Respectfully submitted,

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APPENDIX.

O. D. 426—Community Property in Texas and Washington.

13-20-815
O. D. 426

COMMUNITY PROPERTY IN TEXAS AND WASHINGTON.

A husband and wife may not divide the salary of the husband or of the wife for the purpose of reporting such salary in separate returns for income tax purposes.

Under the laws of Texas and Washington property owned by the husband or wife prior to marriage remains the separate estate of the owner. Accordingly income, such as rents and interest from such property, should be reported by the husband or wife separately after marriage.

The legal owners of community property (property acquired after marriage) in the States of Texas and Washington are the husband and wife jointly in equal shares, and the income accruing therefrom is the joint income of the husband and wife in which each is entitled to one-half. Such income may therefore be divided for income tax purposes and the husband and wife may each report in separate returns one-half thereof. This is held to be true notwithstanding that in law the husband is given the right to manage and control community property the same as his separate estate and that as regards personal property he and he alone may dispose of it. (Ruling 21-19-528; sec. 223, art. 401, modified.) (See, however, T. D. 3071; 39-20-1218.)

T. D. 3071—Containing Opinion of Attorney General Palmer dated August 24, 1926, Regarding Return of Community Property in Texas.

39-20-1218
T. D. 3071

INCOME TAX

Husband and wife—Community property—Opinion of Attorney General.

(1) The earnings of husband and wife domiciled in Texas are community income, and such husband and wife in rendering separate income-tax returns may each report as gross income one-half the total earnings of the husband and wife.

(2) The income from separate property, except the increase, rents and revenues from lands, is community income, and therefore husband and wife domiciled in Texas, in rendering separate income-tax returns, may each report as gross income one-half the total income from separate property, except the increase, rents and revenues from land held separately.

(3) The income from community property as defined in article 4622, Vernon's Sayles' Statutes, is community income, and therefore husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income one-half the total income from such community property.

DEPARTMENT OF JUSTICE,
Washington, August 24, 1920.

Hon. DAVID F. HOUSTON,
Secretary of the Treasury, Washington, D. C.

DEAR MR. SECRETARY: Further acknowledging receipt of your favor of August 12th, requesting my opinion on the three questions of law set forth below, to wit:

(1) Are the earnings of husband and wife domiciled in Texas community income, and may they therefore in rendering separate income tax returns, each report as gross income one-half of the total earnings of the husband and wife?

(2) Is the income from separate property, as defined in article 4621, Vernon's Sayles' Statutes, 1918 edition, community income, and may therefore husband and wife domiciled in Texas, in rendering sep-

arate income tax returns, each report as gross income one-half of the total income from all separate property owned by them?

(3) Is the income from community property as defined in article 4622, Vernon's Sayles' Statutes, 1914 edition, community income, and may therefore husband and wife domiciled in Texas, in rendering separate income tax returns, each report as gross income one-half of the total income from community property?

I have the honor to advise you as follows:

The Revenue Act of 1918 levies a tax on the net income of every individual (secs. 210 and 211). Net income is defined as gross income less deductions allowed (sec. 212). Gross income is defined as follows (sec. 213):

> That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—
>
> (a) Includes gains, profits, and income derived from salaries, wages, compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

The State Constitution of Texas provides:

> ART. VII, sec. 19. Constitution 1845: All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife in relation as well as to her separate property as that held with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

The Statutes of the State of Texas determining property rights of husband and wife are as follows. Article 4622, Vernon's Sayles' Statutes, 1914 edition:

All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only; provided, however, the personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her, and dividends on stocks owned by her shall be under the control, management, and disposition of the wife alone, subject to the provisions of article 4621, as hereinabove written; and further provided that any funds on deposit in any bank or banking institution, whether in the name of the husband or the wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

Article 4621, Vernon's Sayles' Statutes, 1918 edition:

All property, both real and personal, of the husband owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him. All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be the separate property of the wife. During marriage the husband shall have the sole management, control, and disposition of his separate property, both real and personal, and the wife shall have the sole management, control, and disposition of her separate property, both real and personal; provided, however, the joinder of the husband in the manner now provided by law for conveyance of the separate real estate of the wife shall be necessary to an encumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her, or of which she may be given control by this Act; provided, also, that if the husband shall have permanently abandoned his wife, be insane, or shall refuse to join in such encumbrance, conveyance, or transfer of such property, the wife may apply to the district court of the county of her residence, and it shall be the duty of the court, in term time or vacation, upon satisfactory proof that such encumbrance, conveyance, or transfer would be advantageous to the interest of the wife, to make an order granting permission to make such encumbrance, conveyance, or

transfer without the joinder of her husband, in which event she may encumber, convey, or transfer said property without such joinder. Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband. The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint conveyance of both the husband and the wife, except where the husband has permanently abandoned the wife, or is insane, in which instance the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate estate.

The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife, except for necessaries furnished herself and children, unless the husband joins in the execution of the contract. Provided that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by the preceding sentence.

Article 2469, Vernon's Sayles' Statutes:

Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased or descendant of such child or children, then the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive.

The community property system prevails in Texas, Arizona, California, Washington, Louisiana, and New Mexico. It seems to have had its origin in France and Spain and to have been brought thence into our judicial system.

Community property laws provide generally that all property acquired during marriage by the industry and labor of either husband or wife or both, together with the produce and increase thereof, belongs to both in equal shares during the continuance of the marital relation. It has its foundation in the fact or the legal presumption that all property acquired during marriage, otherwise than by gift, devise, or descent, is acquired by the joint efforts of husband and wife (*Nickerson v. Nickerson,* 65 Tex. 281, 284). Their relation

partakes of the nature of a partnership in which each partner may have separate estate or property as well as common stock of acquisitions and gains. The business of the firm generally is transacted in the name of the husband, and he prosecutes and defends its suits with the same effect as if his partner were named in the case (*Simpson v. Brotherton,* 62 Tex. 170); and although community property has not all the incidents of partnership property it has many of them, and is commonly spoken of as partnership property (*De Blanc v. Lynch & Co.,* 23 Tex. 25; *Wilkinson v. Wilkinson,* 20 Tex. 237). In the conventional partnerships the gains of the partners are in proportion to their respective shares of stock and services, but in the conjugal partnerships the division is equal, though one may have brought in the greater part, if not all, of the property from which the profits are derived, or may have contributed all his skill and services unaided by the other (*Wheat v. Owens,* 15 Tex. 241; *Routh v. Routh,* 57 Tex. 589, 595). The fact that one or the other of the spouses may do all the work does not change the character of community property (*Yates v. Houston,* 3 Tex. 452, 454). And though the management and disposal of community property during marriage are usually given to the husband, this is said to be for reasons of public policy and social economy, and not on the grounds that the husband has any greater interest in it than the wife. Section 4622, Vernon's Sayles' Statutes, as amended in 1913 and as set forth above, provides that the personal earnings of the wife, the rents from her estate, the interest on bonds and notes belonging to her, and dividends owned on stocks owned by her shall be under the control, management, and disposition of the wife alone; but the Supreme Court of Texas held, in *Tannehill v. Tannehill,* 171 S. W. 1050, that such amendment did not change the character of rents from the wife's separate property so as to make them her separate property, but that they continued to belong to the com-

munity estate, and the husband was owner of one-half of same. (This before the amendment of section 4621 in 1917 made the rents from separate lands the separate property of the owner of the land.)

In *Tucker v. Carr*, 39 Tex. 98, 102, the court said:

> It is well settled that all property acquired during the marriage, whether by the labor of the husband or the wife, or the joint labor of both, whether the title be made to the husband or to the wife or to both jointly, is community property.

Also see *Cooke v. Bremond*, 27 Tex. 457.

In *Holyoke v. Jackson*, 3 Pac. 841, the Supreme Court of Washington, in defining community property rights in that State, held that the community—

> Is like a partnership, in that some property coming from or through one or other or both of the individuals forms for both a common stock which bears the losses and receives the profits of its management, and which is liable for individual debts; but it is unlike in that there is no regard paid to proportionate contribution, service, or business fidelity; that each individual once in it is incapable of disposing of his or her interest, and that both are powerless to escape from the relationship, to vary its terms, or to distribute its assets or its profits. * * * In it the proprietary interest of husband and wife are equal, and those interests do not seem to be united merely, but unified.

There are numerous decisions holding that the proportional interests of husband and wife in community property are equal, regardless of their individual contributions.

In *Merrill v. Moore*, 104 S. W. 514, the court said:

> This community of interest is not made to depend upon the acquisition of the property during the time the parties actually live together nor upon the fact that there was an equal amount of labor or capital contributed by the husband and wife in its accumulation. It is the property acquired during the marriage (with exceptions stated) that "shall be deemed the common property of husband and wife, and the right to an equality of enjoyment and division thereof, regardless of whether the one or the other has contributed little or nothing to its acquisition," is well recognized.

Also see *Edwards v. Brown*, 68 Tex. 329; *Saunders v. Isbell*, 24 S. W. 307; *Barr v. Simpson*, 117 S. W.

1041; *Wright v. Hays' Admr.*, 10 Tex. 130; *Zimpelman v. Robb*, 53 Tex. 274.

That one-half of the common estate belongs to each spouse is recognized in Treasury Decision 2450, which determines the method of assessing estate tax upon the estate of a decedent spouse.

The decisions in the various States seem to be unaminous on the proposition that the earnings of both husband and wife during the marriage belong to the community.

In *Fennell v. Drinkhouse*, 131 Cal. 447, it was held that money earned by the wife while living with her husband was community property, the court saying:

> The possession of community property by the wife is the possession of the husband.

And in *Martin v. Southern Pacific Company*, 130 Cal. 285, holding that moneys received as damages for injury to the wife are community property, it was said:

> The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property as much as do the earnings received for the services of the husband. If the injury had been received by the husband, it would not be contended that he could not recover for the damage sustained by the loss of his earning capacity. In either case the earnings would be community property, and any act by which either husband or wife is deprived of the capacity to render services diminishes the capacity to accumulate community property. If the services voluntarily rendered by the wife obviate the necessity of employing other assistance, the amount of the community property is thereby enhanced in the amount that would be required for such assistance * * *.

See also *Washburn v. Washburn*, 9 Cal. 475.

Under the Louisiana statutes the profits of the industry of both spouses and the fruits of their separate estates fall into the community. *Succession of Webre*, 49 La. 1491; 22 So. 390; *Knight v. Kaufman*, 105 La. 35; 29 So. 711; *Manning v. Burke*, 107 La. 456; 31 So. 862.

The decisions of the Supreme Court of the State

of Washington are to the same effect. *Abbott v. Weatherby,* 6 Wash. 507; 33 Pac. 1070; *Yake v. Pugh,* 13 Wash. 78; 42 Pac. 528; *Sherlock v. Denny,* 28 Wash. 170; 68 Pac. 452.

There are numerous decisions by the Supreme Court of Texas holding that in Texas the earnings of the husband and wife are community property. *Cline v. Hackbarth,* 27 Tex. Civ. App. 391; 65 S. W. 1086; *Johnson v. Burford,* 39 Tex. 242; *Pearce v. Jackson,* 61 Tex. 642; *Cooke v. Bremond,* 27 Tex. 457.

In the latter case the court said:

> Our whole system of marital rights is based upon the fact that acquisitions either of the joint or separate labor or industry of the husband or wife become common property; and as a general rule deducible from this principle, all property acquired by purchase or apparent onerous title, whether the conveyance be in the name of the husband or of the wife, or in the names of both, is *prima facie* presumed to belong to the community.

Under the laws of the various States wherein the community property system obtains the earnings of separate property of the spouses, with such exceptions as are specifically provided for by statute, are community property. See *Barr v. Simpson,* 117 S. W. 1040 (Tex.), and *Hayden v. McMillan,* 23 S. W. 430 (Tex.).

The latter case was decided when article 2851, Revised Statutes of Texas, provided that all the property owned by the wife before marriage or acquired afterwards by gift, devise, or descent, and the "increase of all lands thus acquired" should be the separate property of the wife. And the court held that rents accruing on the separate lands of the wife were community property and subject to garnishment for community debts. This case also establishes the proposition that such community interest attaches the moment the property comes into existence, the court saying:

> The moment the rents become due they are disconnected from the land and become personal property, and, being acquired by the joint labors of the married couple put forth during the marital relation, they must necessarily be community.

From the above authorities, I am convinced that under the law of Texas the earnings of the husband and wife belong to them jointly in equal shares; that the community interest attaches as soon as the right to the wages comes into existence; and that the increase and revenues from the separate property of each spouse, except the increase, rents, and revenues from lands, is also community property in which the interests of husband and wife are equal.

These propositions being established, it follows that the earnings of husband and wife and the revenues from their separate personal property are community "income" under the provisions of the Act of February 24, 1919. Gross income under the terms of the Act includes—

> Gains, profits, and income derived from salaries, wages, compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property.

The law of Texas presumes that the earnings of the husband and wife are the product of their joint labor and rests the ownership of same in the community; they are therefore community "income," to wit: "Gain, profits, and income" of the community, "derived from salaries, wages, compensation for personal services, * * * professions, vocations," as the case may be.

Under the Statutes of Texas heretofore set forth the separate property of the spouses is defined as that—

> Owned or claimed by him (or her) before marriage, and that acquired afterwards by gift, devise, or descent,

and also—

> The increase of all lands thus acquired, and the rents and revenues derived therefrom.

It is to be noted that the increase of separate personal property and the revenues derived therefrom are not the separate property of the owner of

the personalty, but are community property (*Carr v. Tucker,* 42 Tex., 330; *Epperson v. Jones,* 65 Tex., 425; *Barr v. Simpson,* 117 S. W., 1041). They are therefore "income" to the community, to wit: "Gains, profits, and income * * * from businesses, commerce, or sales or dealings in property * * * growing out of the ownership or use of or interest in such property."

Since one-half of all community property vests in each spouse it follows that one-half of the increase and revenues from separate property of the spouses, except increase and rents and revenues from lands, is income to each of said spouses.

Community property, under the laws of Texas, belongs jointly to husband and wife; it follows that the income therefrom accrues to husband and wife in equal shares. I therefore conclude:

1. That the earnings of husband and wife domiciled in Texas are community income, and such husband and wife, in rendering separate income tax returns, may each report as gross income one-half the total earnings of the husband and wife.

2. That the income from separate property, except the increase, rents, and revenues from lands, is community income, and that therefore husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income one-half the total income from separate property, except the increase, rents, and revenues from land held separately.

3. That the income from community property as defined in article 4622, Vernon's Sayles' Statutes, quoted above, is community income, and that therefore husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income one-half the total income from such community property.

Respectfully,

A. Mitchell Palmer.
Attorney General.

T. D. 3138—Containing Opinion of Attorney General Palmer dated February 26, 1921, Regarding Separate Return of Community Incomes in States Other Than Texas.

11-21-1515
T. D. 3138

1. INCOME TAXES—HUSBAND AND WIFE—COMMUNITY PROPERTY.

In Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income one-half of the income which under the laws of the respective States becomes, simultaneously with its receipt, community property; this is not based upon any statute enacted subsequent to March 1, 1913, and applies under income tax Acts prior to the Revenue Act of 1918.

2. ESTATE TAX—HUSBAND AND WIFE—COMMUNITY PROPERTY.

In Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada there should be included in gross estate, in computing the estate tax of a deceased spouse, one-half only of the community property of husband and wife domiciled therein; this is not based upon any statute enacted subsequent to March 1, 1913, and applies under estate tax Acts to the Revenue Act of 1918.

TREASURY DEPARTMENT,

OFFICE OF COMMISSIONER OF INTERNAL REVENUE,

Washington, D. C.

To Collectors of Internal Revenue and others concerned:

There is given below in full for your information and guidance an opinion rendered by the Attorney General under date of February 26, 1921, dealing with the right of husband and wife domiciled in certain States having so-called "community property" laws to divide certain of their income for the purpose of the income tax, and as to the inclusion of community property in the gross estate of a deceased spouse.

See, in this connection, Treasury Decision No. 3071. (C. B. 3, p. 221.)

WM. M. WILLIAMS,
Commissioner of Internal Revenue.

Approved: March 3, 1921.

D. F. HOUSTON,
Secretary of the Treasury.

DEAR MR. SECRETARY:

My opinion has been requested upon the following questions:

1. In which of the States, other than Texas, in which the community property system exists may a husband and wife domiciled therein, in rendering separate income tax returns, each report as gross income one-half of the income which under the laws of such State becomes, simultaneous with its receipt, community property?

2. In which of the States in which the community property system exists should there be included in gross estate, in computing the estate tax of the estate of a deceased spouse, one-half and only one-half of the community property of husband and wife domiciled therein?

3. If your answers to questions 1 and 2 as to any State are based upon a statute enacted subsequent to March 1, 1913, please give the rule as to such State existing from March 1, 1913, to the passage of such statute, for my guidance in allowing claims for refund.

4. Do your answers to questions 1 and 2 apply under income and estate tax Acts prior to the Revenue Act of 1918?

The community property system prevails in Arizona, California, Idaho, Louisiana, Nevada, New Mex-

ico, Texas and Washington. The application of the income tax Act to the income from community property belonging to husband and wife domiciled in Texas was disposed of in my opinion of September 10, 1920.

The significant portions of the Arizona statutes bearing upon the community property system in that State, all of which except article 1100 were enacted prior to 1913, are:

ART. 3850. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, or earned by the wife and her minor children while she has lived or may live separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; but husband and wife must join in all deeds and mortgages affecting real estate except unpatented mining claims, which may be conveyed by the husband or wife only, as provided by the laws of this State relating to conveyances; provided that either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage.

ART. 1100. Upon the death of the husband one half of the community property shall go to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants equally, if such descendants are of the same degree of kindred to the decedent, otherwise according to the right of representation; and in the absence of both such distribution and such descendants is subject to distribution in the same manner as the separate property of the husband. Upon the death of the wife one half of the community property shall go to the surviving husband and the other half is subject to the testamentary disposition of the wife, and in the absence of such disposition goes to the descendants equally, if such descendants are of the same degree of kindred to the decedent, otherwise according to the right of representation, and in the absence of both such distribution and such descendants is subject to distribution in the same manner as the separate property of the husband.

ART. 2061. No conveyance, transfer, mortgage, or incumbrance of any real estate which is the common property of husband and wife, or any interest therein, shall be valid unless such conveyance, transfer, mortgage, or incumbrance shall be executed and acknowledged by both the husband and wife. But the provisions of this section shall not apply to unpatented mining claims, which may be conveyed, transferred, mortgaged, or incumbered by the one in whose name the title or right of possession of any such mining claim may be without the other joining in such conveyance, transfer, mortgage, or incumbrance.

ART. 3848. All property, both real and personal, of the husband owned or claimed by him before marriage and that acquired afterward by gift, devise, or descent, as also the increase, rents, issues, and profits of the same, shall be his separate property, and all property,

both real and personal, of the wife owned or claimed by her before marriage and that acquired afterward by gift, devise, or descent, as also the increase, rents, issues, and profits of the same, shall be her separate property.

Prior to 1913, article 1100 read:

Upon the dissolution of the marriage relation by death all the common property belonging to the community estate of the husband and wife shall go to the survivor if the deceased have no child or children; but if the deceased have a child or children, his survivor shall be entitled to one half of said property, and the other half shall pass to the child or children.

The Supreme Court of the State of Arizona has held these statutes establish in the wife an equal interest with the husband in community property in that State. In the case of *La Tourette v. La Tourette*, 15 Ariz. 200 (1914), the court said, after reviewing the statutes above set forth:

The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. Its policy plainly expressed is to give the wife in this marital community an equal dignity, and make her an equal factor in matrimonial gains.

* * * * * * * * * *

That the interest of the wife in the community property during the coverture is not a mere possibility—not the expectancy of an heir—is quite apparent. The old saying is not true that community is a partnership which begins only at its end. Upon the dissolution of the community by death, the wife does not inherit her share of the common property, but with the death of the husband the management and control of the statutory agent or trustee ceases. The wife acquires not her share, for that was already hers, but in addition to her share she acquires the right of management, control, and disposition of that share, her status being thereby fixed as that of a *feme sole*. If there be no child or children of the deceased husband, all of the common property goes to the surviving wife. She has her share in the property, and in addition, by right of survivorship and not as an heir, she acquires the share that belonged to the husband, and she takes all of the property in her own right, and with respect to the management, control, and disposition of such property is reduced to the status of a *feme sole* and must thenceforward with respect to it act for herself.

The Idaho law provides, article 4656 of the compiled Statutes of 1919, that all property of the wife

owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, or that which she shall acquire with the proceeds of her separate property, shall remain her sole and separate property to the extent and with the same effect as the property of her husband similarly acquired.

Article 4659 defines the separate property of the husband to be all property owned by him before marriage, and that acquired by gift, bequest, devise, or descent. Community property is defined as—

> All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife * * * unless by the instrument by which any such property is acquired by the wife it is provided that the rents and profits thereof be applied to her sole and separate use; in which case the management and disposal of such rents and profits belong to the wife, and they are not liable for the debts of the husband.

By article 4666—

> The husband has the management and control of the community property except the earnings of the wife for the personal services and the rents and profits of her separate estate. But he can not sell, convey, or encumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered.

This section, which was amended in 1915 to read as above, previously and by amendment in 1913, provided:

> The husband has the management and control of the community property, but he shall not sell, convey, or encumber community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and by his wife.

A new provision of the law of 1915, article 4667, reads:

> The wife has the management and control of the earnings for her personal services, and the rents and profits of her separate estate.

On the death of either husband or wife it is provided by article 7803, that—

One-half of all the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife in favor only of his, her, or their children, or a parent of either spouse, subject also to the community debts, provided that not more than one-half of the decedent's half of the community property may be left by will to a parent or parents. In case no such testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall go to the survivor, subject to the community debts, the family allowance and the charges and expenses of administration: *Provided, however,* That no administration of the estate of the wife shall be necessary if she dies intestate.

Section 5713, as previously enacted in 1907, provided:

Upon the death of either husband or wife one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her share of the community property it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

In *Ewald v. Hufton*, 31 Idaho, 373 (173 Pac., 247), decided in 1918, the Supreme Court of Idaho said that under the laws of Idaho no distinction is made between husband and wife as to the degree, quantity, nature, or extent of the interest each has in community property, and held that upon the dissolution of the community by the death of either spouse the survivor becomes tenant in common with the heirs of the deceased member, and the survivor can not convey title to the half belonging to the heirs which descended to them from the deceased spouse. It was therein decided that after the death of the wife a conveyance by the surviving husband conveys title only to his half.

In *Kohny v. Dunbar*, 21 Idaho 258 (121 Pac. 544), decided in 1912, the Supreme Court of Idaho fully con-

sidered the respective interests of husband and wife. This was a case where it was attempted, after the death of the husband, to levy an inheritance tax under the Idaho inheritance tax law upon the wife's half of the community property. The court held that section 5713, Revised Statutes of Idaho, as amended in 1907, in force at the time of the death of Kohny recognized the husband and wife as equal partners in the community estate and authorized each to dispose of his or her half by will, and that the survivor on the death of one spouse, merely continued to hold as owner one-half of the community property subject to the payment of community debts, saying:

> This statute clearly and unmistakably provides that the surviving spouse takes his or her half of the community property, not by succession, descent, or inheritance, but as survivor of the marital community or partnership. The same section provides further that in the event there be no issue of the marriage living at the time of the death of one of the spouses and he or she leaves no will or testament, the half of the community property which belonged to the deceased shall go to the survivor as an heir, and therefore, by descent and under and by virtue of the intestate laws of the State.
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> * * * * * * * * * *
>
> Since the interests of both husband and wife are the same and equal in and to the community property, and each takes one-half interest therein by will, it is clear to us that if the wife must pay an inheritance tax on her half of the property upon the death of the husband, that the husband would likewise be obliged to pay an inheritance tax on his half of the property on the death of his wife. The law clearly places them both on an equality in this respect. This illustration, however, accentuates the unreasonableness of the contention, for no one claims that the husband is required to pay such tax on his interest in the community estate.
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> * * * * * * * * * *
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> We conclude that upon the death of husband or wife the survivor takes one-half of the property in his or her own right as survivor and is not liable under section 1873 (Inheritance Tax Act) to pay an inheritance tax on such interest in the community estate.

The significant portions of the laws of Louisiana bearing on the questions before us are found in the following articles of the Revised Civil Code:

> ART. 915. In all cases, when either husband or wife shall die, leaving no descendants nor ascendants, and without having disposed, by last will and testament, of his or her share in the community prop-

erty, such undisposed of share shall be inherited by the survivor in full ownership.

ART. 916. In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed, by last will and testament, of his or her share in the community property, the survivor shall hold a usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage.

Article 915 was amended in 1920 to read as follows:

When either husband or wife shall die, leaving neither a father nor mother nor descendants, and without having disposed by last will and testament of his or her share of the community property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother (or either), then the share of the deceased in the community estate shall be divided in two equal portions, one of which shall go to the father and mother or the survivor of them, and the other portion shall go to the surviving spouse.

ART. 2332. The partnership, or community of acquets or gains, needs not be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

ART. 2334. The property of married persons is divided into separate property and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage by inheritance or by donation made to him or her particularly.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared.

ART. 2385. The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

ART. 2386. When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belongs to the conjugal partnership, if there exists a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hands, but the fruits and revenues which are existing at the dissolution of the marriage belong to the owner of the things which produce them.

ART. 2399. Every marriage contracted in this State superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

ART. 2402. The partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce

of the reciprocal industry and labor of both husband and wife, and of the estates, which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

ART. 2404. The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance *inter vivos*, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

ART. 2406. The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

These statutes were all enacted prior to 1913 except article 915 which was amended in 1916 and again in 1920. The latter amendments provide for the succession of the deceased spouse's half of the community property when such spouse dies without disposition of such interest by will.

Up to 1907, with a few exceptions, the courts of Louisiana appear to have generally adhered to the view that the wife's interests in the community property is that of an expectant heir, and that she has no vested interest therein until the dissolution of the community. But in the Succession of Marsal, 118 La. 211 (1907), it is held that the wife did not take either her one-half of the community property nor the usufruct of her husband's one-half as heir

(art. 916) and that she was not therefore compelled to pay an inheritance tax on either under the inheritance tax law of Louisiana, saying:

> It is true that the right of usufruct which is vested in the surviving spouse is defeasible at the will of the deceased, but it is, nevertheless, a right conferred by the law, which enters into and forms a part of the marriage contract, and, of which the survivor can be deprived by no one save the deceased spouse, and it seems to us hardly correct to say that the surviving spouse necessarily takes the usufruct by inheritance from the deceased, because the latter has not made a testamentary disposition to the contrary.

In the Succession of May, 120 La. 691 (1908), it was held on the other hand that where a deceased wife had by will bequeathed her one-half interest in the community property to her husband, the husband must pay an inheritance tax on such share after community debts had been deducted from the whole.

The principle that the rights of husband and wife in the partnership's gains grow out of the marriage contract and do not originate at its dissolution was expounded by the court in *Dixon v. Dixon's Executors*, 4 La. 188 (1831), where it was said that the wife has rights in the acquets before the husband dies and that the objection confounds the power of the husband to defeat the wife's rights with the existence of such rights.

In *Beck v. Natalie Oil Co.*, 143 La. 154 (1918), the court said:

> The property involved in this suit was acquired by the father of plaintiffs while the community of acquets and gains existed between him and the mother of the plaintiffs, and the mother of the plaintiffs, as partner in community, became owner of one-half of it. This half the plaintiffs inherited from their mother, subject to the payment of the debts of the community.

In New Mexico the following statutes, enacted in 1907 or prior thereto, define the respective rights of husband and wife in that State:

> SEC. 2757. All property of the wife owned by her before marriage and that acquired afterwards by gift, bequest, devise or

descent, with the rents, issues and profits thereof is her separate property. The wife may without the consent of her husband convey her separate property.

SEC. 2758. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof is his separate property.

SEC. 2764. All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing the presumption is that title is thereby vested in her as her separate property. And if the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common unless a different intention is expressed in the instrument, and the presumption in this section mentioned, is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration. And in cases where married women have conveyed or shall hereafter convey, real property which they acquired prior to March 18, 1907, the husband, or their heirs or assigns, of such married women, may be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: As to conveyances hereafter made from and after one year from the filing for record in the county clerk's office of such conveyances respectively.

SEC. 2766. The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate: *Provided, however*, That he can not make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto, and *Provided, also*, That no sale, conveyance, or incumbrance of the homestead, which is then and there being occupied and used as a home by the husband and wife, or which has been declared to be such by a written instrument signed and acknowledged by the husband and wife and recorded in the county clerk's office of the country, and furniture, furnishings, and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife.

SEC. 2767. Whenever the husband is *non compos mentis* or has been convicted of a felony and sentenced to imprisonment for a period of more than one year or has abandoned his wife and family, and left her and his family, if they have children, without support or is an habitual drunkard or for any other reason is incapacitated to manage and administer the community property the wife may present a petition duly verified to the district court of the county wherein any of the community property is located or situated, stating the name of her husband, a description of all community property, both real and personal, and the facts which render him incapacitated to manage and administer the community property and praying that she be substituted for her husband, as the head of said community, with the same power of managing, ad-

ministering, and disposing of the community property, as is vested in the husband by this chapter.

SEC. 2770. Upon the hearing of the petition so filed by the wife the court shall render judgment therein, either dismissing said petition or adjudging the wife thereafter to be the head of said community, with full power of managing, administering, and disposing of the community property, either real or personal, with such limitation therein as to the court may appear to be in furtherance of justice.

SEC. 2774. Whenever husband and wife shall have permanently separated and no longer live or cohabit together as husband and wife, either may institute suit in the district court for a division of property, or for the disposition of the children, without waiting for or obtaining in said suit a dissolution of the bonds of matrimony; * * *.

SEC. 2781. The failure to divide the property on divorce shall not affect the property rights of either the husband or wife; either may subsequently institute and prosecute a suit for division and distribution thereof, or with reference to any other matter pertaining thereto which could have been litigated in the original suit for divorce.

SEC. 1840. Upon the death of the wife the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by a judicial decree for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

SEC. 1841. Upon the death of the husband one half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent and further as provided by law. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance, and the charge and expenses of administration.

Section 2766 was amended in 1915 to read as follows:

The husband has the management and control of the personal property of the community, and during coverture the husband shall have the sole power of disposition of the personal property of the community, other than testamentary, as he has of his separate estate; but the husband and wife must join in all deeds and mortgages affecting real estate: *Provided*, That either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage; and, *Provided further*, That any transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect.

In the recent case of *Beals v. Ares*, 185 Pac. 780 (1919), the Supreme Court of New Mexico carefully reviewed the history of the community property system in New Mexico, arriving at the following conclusions:

(1) That under the law in this jurisdiction the wife's interest in the community property is equal with that of the husband; that, while he is by statute made the agent of the community and given dominion and control over the community property during the continuance of the marriage relation, his interest in the property by reason of such fact is not superior to that of his wife.

(2) That the wife does not forfeit her interest in the community property by the commission of adultery.

(3) That there is no statute in this State conferring upon the district court the power to divide the community property between the parties at its discretion; that, while it has power to divide the property, this power does not extend further than to set apart to each of the spouses their undivided half interest in the property.

(4) That the district courts have the power in all cases to set apart such portion of the community property or of the property of the respective spouses as in its discretion may be necessary for the proper support, care, and maintenance of the children born as a result of the marriage.

The conclusion of the court that the interest of husband and wife in community property are equal is based upon the provisions of section 2774 and 2781; the former, the court says:

Clearly recognizes an existing, present interest in the wife during the existence of the matrimonial status: * * *. Section 7481 recognizes that this interest continues even after divorce, where the property is not divided by the decree in the divorce case. Now, if she had no interest in the property during the existence of the community, but simply an expectancy which would ripen into an interest only upon the death of the husband, and which expectancy continued only during the existence of the marital status, this expectant interest would be cut off by the divorce decree * * *.

* * * The sections referred to clearly recognize a present interest in the wife, and the whole act shows that she was an equal partner with her husband in the matrimonial gains. He was constituted by section 16, c. 37, Laws 1907, as the agent or manager of the community property, but this did not vest him with the larger or superior interest in the property upon division.

In Nevada the relative rights of husband and wife in community property are defined in the following sections of the Revised Laws of that State:

SEC. 2155. All property of the wife owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property; and all property of the husband, owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

SEC. 2156. All other property acquired after marriage, by either husband or wife or both, except as provided by sections 14 and 15 of this Act, is community property.

SEC. 2160. The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate: *Provided*, That no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has ben filed or not, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate: *Provided further*, That the wife shall have the entire management and control of the earnings and accumulations of herself and her minor children living with her, with the like absolute power of disposition thereof, when said earnings and accumulations are used for the care and maintenance of the family.

SEC. 2164. Upon the death of the wife the entire community property belongs without administration, to the surviving husband, except that in case the husband shall have abandoned his wife and lived separate and apart from her without such cause as would have entitled him to a divorce, the half of the community property subject to the payment of its equal share of the debts, chargeable to the estate owned in community by the husband and wife, is at her testamentary disposition in the same manner as her separate property, and in the absence of such disposition goes to her descendants equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, goes to her other heirs at law, exclusive of her husband.

SEC. 2165. Upon the death of the husband one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his surviving children, equally, and in the absence of both such disposition and surviving children, the entire community property belongs without administration to the surviving wife except as hereinafter provided, subject, however, to all debts contracted by the husband during his life that were not barred by the statute of limitations at the time of his death: *Provided, however*, That the homestead set apart by the husband and wife, or either of them before his death, and such other property as may be exempt by law from execution or forced sale, shall be set apart for the use of the widow and minor heirs, and if no minor heirs, for the use of the widow. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance and charges and expense of administration:

Provided, however, That if in the absence of said testamentary disposition the surviving wife and children, and in the absence of such children the wife shall pay or cause to be paid all indebtedness legally due from said estate, or secure the payment of the same to the satisfaction of the creditors of said estate, then and in such case the said community property shall not be subject to administration.

Section 2166 provides that on dissolution of the marriage on divorce the community property must be equally divided between the parties, except that in case of divorce for adultery or extreme cruelty the guilty party is entitled to only so much thereof as the court may allow. All of the above sections, except 2160, which was amended in 1917, were enacted prior to 1913.

One of the most recent and comprehensive decisions of the Supreme Court of Nevada, interpreting the above statutes and defining the interests of husband and wife in community property, is In re Williams, 40 Nev. 241, rendered in 1916. In that case it was sought to collect a tax under the Nevada inheritance tax act of 1913 on the one-half of the community property which passed to the wife on the death of the husband. But the court, after a careful review of the decisions and the constitution of the State, which provided in section 31 of article 4, that "laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property, *as to that held in common with her husband,*" said:

> It may, we think, be asserted, supported by the great weight of authority, that the interest of the wife in the community property and her title thereto is no less than that held by the husband, and this interest and title in the wife is not to be regarded as a mere expectancy.
>
> Concluding, as we do, that the wife's interest in the community property goes to her, not by succession or inheritance, but rather by a right vested in her at all times during marriage, it follows that it is not subject to the law of inheritance tax.

The respective rights of the husband and wife in the community property of the State of Washington

are defined by the following sections of Pierce's Washington Code of 1919, all of which were enacted prior to 1913:

SEC. 1424. The property and pecuniary rights of every married woman at the time of her marriage or afterwards acquired by gift, devise, or inheritance, with the rents, issue, profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber, or devise by will such property to the same extent and in the same manner that her husband can, property belonging to him.

SEC. 1428. A wife may receive the wages of her personal labor, and maintain an action therefor, in her own name and hold the same in her own right, and she may prosecute and defend all action at law for the preservation and protection of her rights and property as if unmarried.

SEC. 1432. Property and pecuniary rights owned by the husband before marriage and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise by will such property without the wife joining in such management, alienation, or encumbrance as fully and to the same effect as though he were unmarried.

SEC. 1433. Property not acquired or owned, as prescribed in sections 2400 and 2408, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the mangement and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

SEC. 1434. The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: *Provided, however,* That all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, and to liens of judgments recovered for community debts, and to sale on execution issued thereon.

SEC. 1435. Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts.

SEC. 1436. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living or none of their representatives living, then the said com-

munity property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

It appears to be the settled law of that State that the wife has, during coverture, as well as upon the dissolution of the marriage, a vested and definite interest and title in community property, equal in all respects to the interest and title of her husband therein. Leading cases are: *Holyoke v. Jackson*, 3 Wash. T. 235; *Mabie v. Whittaker*, 39 Pac. 172; *Marston v. Rue*, 92 Wash. 129 (159 Pac. 111); *Schramm v. Steele*, 166 Pac. 634 (97 Wash. 309); *Huyvaerts v. Roedtz*, 178 Pac. 801.

The statutes of California defining the relative property rights of husband and wife are found in the following sections of the Civil Code:

SEC. 162. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

SEC. 163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

SEC. 164. All other property acquired after marriage by either husband or wife, or both, *including real property situated in this State, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State*, is community property; but wherever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance is to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration. And in cases where married women have conveyed, or shall hereafter convey, real property which they acquired prior to May nineteenth, one thousand eight hundred eighty-nine, the husband, or their heirs or assigns, of such married women, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: As to conveyances heretofore made, from and after one year from the date of the taking effect of this act;

and as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

SEC. 172. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate: *Provided, however,* That he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

SEC. 172a. The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered: *Provided, however,* That the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate.

SEC. 1401. Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

SEC. 1402. Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.

Sections 164 and 172 were amended to read as above in 1917, and 172a was then added. The changes in sec. 164 then made are underlined (italics). Prior to 1917 sec. 172 applied to all the community property and was amended only by the insertion of the word "personal." Section 172a imposes a limitation upon the power of the husband to alienate community real property.

While the statutes of California are in some respects similar to the community property laws of the other community property States, the rule established by the highest courts of that State is that during coveture the wife has no vested interest in the community property, her interest therein being a mere expectancy.

In *Spreckles v. Spreckles*, 116 Cal. 339 (1897), the supreme court of that State held that prior to the amendment of 1891 to sec. 172 of the Civil Code, forbidding the husband to give away community property without consent of the wife in writing, the code vested in the husband all the elements of absolute ownership of the community property; that the wife's interest was a mere expectancy, and as to all the world except the wife, there was, prior to that amendment, no distinction between the community estate and the separate estate of the husband; and that the amendment could not be construed retroactively so as to deprive the husband of his vested right to dispose by gift of community property acquired prior to the amendment without the consent of the wife.

In 1905 California passed an inheritance tax law, and subsequently the question was raised whether a widow should be compelled to pay such tax on that one-half of the community property that she took on the death of her husband. In the Estate of Moffitt, 153 Cal. 359 (1908), the Supreme Court of California held that she did, since she had no vested interest in the community estate and took her one-half on the death of her husband as his heir.

This case was taken to the Supreme Court of the United States (*Moffitt v. Kelly*, 218 U. S. 400) where the judgment of the lower court was affirmed, the court laying down the rule that the nature and character of the right of the wife in community property for the purpose of taxation is a peculiarly local question, and the determination of the State court in regard thereto is not reviewable by the Su-

preme Court; and, further, that the law of California of 1905, taxing all property passing by will or intestacy, having been construed by the highest court of that State as applying to the wife's share of the community property, such tax is not in conflict with the contract, due process, or equal protection clauses of the Constitution.

Subsequently the inheritance tax law of California was amended to provide "that for the *purpose of this act*" the one-half of the community property which goes to the surviving wife on the death of her husband, under the provisions of section 1402 of the Civil Code, "shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass, or be transferred to her for valuable and adequate consideration."

It is obvious that this language does not change the rule of community property in the State nor vest in the wife any interest thereto prior to the dissolution of the community; rather it emphasizes the existing rule that the wife has no vested interest in community property.

As to the effect of section 172a of the Civil Code, enacted in 1917, it is not to be presumed that the legislature intended by the enactment of same to make so revolutionary a change in the existing rule of property in California as to devest the husband of his ownership in the community property. As was said in *Spreckles v. Spreckles, supra,* "if a husband can not make a valid transfer of the property for the purpose of depriving his wife of it, that does not show a vested right in her;" and giving the fullest possible effect to the language, unless the wife had a vested interest by virtue of the law as it theretofore existed, which it must be conceded she did not, the operation of the amendment would necessarily be confined to community property acquired after May 23, 1917.

SUMMARY.

Summarizing, it appears that in all of the community-property States except California their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property. Her rights in the property of the community are perhaps most fully recognized in the State of Washington, where both spouses have testamentary disposition over one-half of the community property, and where in the absence of such disposition it descends to their issue, or, in the absence of issue, to the survivor; while the husband is manager of the community estate in Washington he may not sell, convey, or encumber real estate unless the wife join with him in the conveyance; and as was held in *Huyvaerts v. Roedtz, ante,* and *Schramm v. Steels, ante,* the separate debt of the husband can not be satisfied out of community property where it is not incurred in connection with the community business, nor for the benefit of the community.

In Idaho it is seen that the limitation upon the alienation of the community real property is the same as in Washington. But while the wife's earnings and the rents and profits of her separate estate are community property she is given the management and control of same. The Idaho rule governing the disposition of community property on the death of either spouse is, with minor variations, the same as that of Washington. In neither State is an inheritance tax payable on the one-half of the community that goes to the one spouse on the death of the other.

In Arizona the husband only may dispose of community personal property, but the wife must join him in deeds or mortgages affecting real estate, except unpatented mining claims. One-half of the community property is subject to the testamentary disposition of either spouse, and in absence of such disposition goes to his or her descendants; where

there is neither testamentary disposition nor descendants it is subject to distribution in the same manner as the separate property of the husband. On decree of divorce the court may divide the property as he sees fit, but in the absence of provision for the community property the parties from the date of the decree hold as tenants in common. The courts of Arizona hold that the wife is equal owner with her husband.

In Nevada, the husband has the entire management and control of the community property, except that the wife has entire control of her earnings when living separate from her husband. Upon her death the husband takes the whole community estate, except that where he has abandoned her without good cause she may by will dispose of half and in absence of such disposition it goes to her heirs, exclusive of her husband. On the death of the husband the wife takes half and the husband may dispose of the other half by will, or it goes to his surviving children; if there is no will and no children survive, the whole goes to the wife without administration, subject to certain provisos. On dissolution of community by divorce for any other ground than adultery or extreme cruelty, the community property must be equally divided between the parties. The wife pays no inheritance tax under the inheritance tax law of Nevada on her interest in community property, the courts holding that she takes not as heir but by a right vested in her at all times during marriage. It is to be noted that the constitution of Nevada recognizes the wife's interest in community property.

In New Mexico, while the husband is manager of the community estate, he may not transfer real property without a valuable consideration without the written consent of his wife; and under certain circumstances the wife may be substituted as manager; prior to 1915 he could not transfer community personal property except for a valuable consideration without her written consent; on dissolution of the

community by the death of the wife the husband takes all except such portion as may have been set aside to the wife by judicial decree, which portion goes to her heirs unless she has disposed of same by will; on death of the husband one-half goes to the wife and the other half is subject to testamentary disposition by the husband. If he makes no will one-fourth of his one-half goes to the wife and the remainder to the children. On separation either may petition for division of community property and after divorce continue to hold as tenants in common where no disposition has been made in the divorce decree. New Mexico has no State inheritance tax act.

In Louisiana the community property comprehends all property acquired during the marriage by either husband or wife except that acquired with separate funds or by inheritance or particular donation, and excepting the earnings of the wife when she is living separate from her husband; the husband is manager of the community but he may not convey community immovables by gratuitous title, and can not dispose of movables in fraud of the wife; either spouse may dispose of one-half the community property by will and the laws governing the descent of such property in the absence of testamentary disposition apply equally to both spouses, the survivor taking the deceased spouse's half by inheritance when there is no will, and neither father, mother, or descendants. As heretofore stated, the survivor pays no inheritance tax on his or her one-half of the community property but does pay on that part inherited from the deceased spouse.

In California the wife has no power of testamentary disposition of community property except of such as may have been set aside to her by judicial decree; she takes one-half as heir on the death of the husband; but on the death of the wife the entire community property belongs to the husband without administration. The California courts have held that under the law as it stood prior to 1917 the wife

had no vested interest in community property prior to the dissolution of the marriage; the amendment to the inheritance tax act being limited to the purposes of that act could not have had the effect of vesting an interest in her, and had the addition of Sec. 172a had that effect any amendment of the inheritance tax act would have been unnecessary to exempt her one-half from taxation thereunder. In the case of *Blum v. Wardell*, now pending before the Circuit Court of Appeals of the Ninth Circuit, on appeal from the District Court of the Northern District of California, the application of the Federal Estate Tax Act of 1916 is under consideration.

As appears from my opinion of September 10, 1920, in Texas the control of community property is divided between the husband and wife; in that State on the death of either spouse without issue the survivor takes the whole and where there is issue, takes one-half, the other half going to said issue or their descendants. Under the State inheritance tax law the wife pays no tax on her half of the community property.

In *Warburton v. White*, 176 U. S. 484, 496, the principle was enunciated that where State decisions have interpreted State laws governing property or controlling relations that are essentially of a domestic and State nature the United States Supreme Court will follow the State decisions, if possible to do so, in the discharge of its duties. Also in *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, it was held that to the law of the State in which property is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. In *United States v. Crosby*, 7 Cranch 115, it was held that the title to land can be acquired and lost only in the manner prescribed by the law of the place where same is situated.

In arriving at an answer to the questions propounded by you we are called upon to determine the

rules of property in the community property States; we have, therefore, pursuant to the rules of the above cases, adopted the rules laid down by the highest courts of the various States. There remains to be determined the application thereto, of the income and estate tax provisions of Federal statutes. In my previous opinion it was stated that since in Texas the ownership in one-half of all community property vests in each spouse, whatever is income to the community is income to both. This conclusion applies, therefore, to all States in which community property is held to be vested equally in both spouses.

Section 201 of the Revenue Act of 1916 and sec. 401 of that of 1918 impose a tax "upon the transfer of the net estate of every decedent" dying after the passage thereof, to be determined as is set forth in the sections following, which are:

Revenue Act of 1918.

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * * *

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

Subdivisions (a) and (e) of section 202 of the Revenue Act of 1916 are identical with subdivisions (a) and (d) of section 402 of the Revenue Act of 1918, quoted above.

While the community estate of husband and wife has not in the strictest sense all the incidents of a joint estate or an estate in the entirety, as they were known at common law, I am convinced that the community estate is for all practical purposes within

the language of subdivision (d) of section 402, there being deductible therefrom, in arriving at the net estate of decedent, the one-half interest of the surviving spouse, which may be shown to have originally belonged to such person and never to have belonged to the decedent.

And even though it should be held that the community estate is not a "joint estate" or an "estate in the entirety" within the meaning of the Revenue Acts, the one-half interest of the deceased spouse in community property would still be subject to tax under the language of subdivision (a) above.

My answers to your questions are therefore:

(1) That in Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income one-half of the income which under the laws of the respective States becomes, simultaneously with its receipt, community property.

(2) In the States mentioned, in answer to question one, there should be included in gross estate, in computing the estate tax of a deceased spouse, one-half only of the community property of husband and wife domiciled therein.

(3) Neither of the above answers is based upon a statute enacted subsequent to March 1, 1913.

(4) My answers to these questions apply under income and estate tax Acts prior to the Revenue Act of 1918.

Respectfully,

(Signed) A. MITCHELL PALMER,
Attorney General.

Hon. DAVID F. HOUSTON,
Secretary of the Treasury,
Washington, D. C.

Opinion of Acting Attorney General Mitchell dated July 16, 1927.

DEPARTMENT OF JUSTICE,
July 16, 1927.

Sir: Under date of February 3, 1926, you asked me to reconsider two opinions of the Attorney General, the first dated September 10, 1920 (32 Op. 298), and the second dated February 26, 1921 (32 Op. 435). These opinions deal with the nature of the wife's interest in community income under the systems prevailing in the States of Texas, Washington, Arizona, Idaho, New Mexico, Nevada, and Louisiana, a list which includes all of the States excepting California in which any form of the community property system is in force. In the earlier opinion it was held that in Texas the wife had such an interest in the community income as to entitle her to return half of it as her income under the Revenue Act of 1918. In the opinion of February 26, 1921, a similar conclusion was reached respecting the wife's interest in the community income under the systems prevailing in the other states mentioned.

Your request for reconsideration followed the decision of the Supreme Court of the United States in the case of *United States v. Robbins*, 269 U. S. 315, decided January 4, 1926, in which it was held that the wife's interest in the community income under the system in force in California in 1918 was not substantial enough during the existence of the community to entitle her to separately return half of it as her income under the Revenue Act of 1918.

The questions involved are not matters of construction of the Revenue Acts of the United States, but involve the nature of the wife's interest in the community income. The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income if that income belongs to him, and to prevent

the wife from returning a share of the community income as her own unless that share belongs to her. Neither the opinions of the Attorney General upon this subject nor the rulings of the Treasury Department have been based on any interpretation of the Acts of Congress. The nature and extent of a wife's interest in community income in any of these States is to be determined from the statutes and decisions of the State. In determining the nature of an interest in community income created by State law, it is necessary for the Federal courts to accept the decisions of the State courts construing the statutes creating the interest and to determine from the statutes and decisions of the State courts the intrinsic nature of that interest. While the adjectives used by State courts in an effort to describe the nature of the wife's interest in community income are not necessarily controlling on the Federal courts as to the extent of the wife's interest, decisions of the State courts holding what rights of a proprietary nature the wife may exercise in respect of community income are binding on the Federal courts. I have made these observations to show that it has been necessary, as the result of your request, to make a very exhaustive examination of the statutes and decisions of the seven States mentioned relating to community property. This laborious task was undertaken with the expectation of reaching conclusions on the law which might be expressed in response to your request for reconsideration, but the result has led me to the conclusion, which possibly I might have anticipated at the outset, that the problems presented can not be settled by any opinion of the Attorney General and that the situation makes it inappropriate under established precedents for me to express any conclusions. My predecessors have refrained from rendering opinions on questions pending in the courts for decision and have frequently refrained from expressing opinions where it is evident the matter is

bound to be the subject of judicial decision in the immediate future.

The decision in the case of *United States v. Robbins, supra,* dealing with the California system, does not necessarily dispose of the problem in the other States in which some forms of the community property system are in effect. In that case the ultimate inquiry was as to the extent to which, under the statutes and decisions of California, the wife could exercise rights of ownership over a share of the community income. The same problem arises in each of the other States above mentioned. There are very substantial differences between the so-called community property systems in these various States. No two of them are just alike. Some resemble very closely the system in California dealt with in the *Robbins case,* but in other States the systems differ very considerably from the California system. In some of the States the extent of the wife's proprietary interest or ownership in community income derived from one source differs from that in community income derived from other sources. While I have acquired opinions on the subject as result of the examination of the statutes and decisions of these States and the proper answer to the questions involved may be more evident as to some of the States than as to others, I believe for the reasons stated that it would be inappropriate and ineffective for me to deal with the subject in an opinion with a view to having your regulations and methods of dealing with community income changed. The answers to the questions involved are not so obvious as to make it clear what conclusions the courts may reach. To overturn by administrative actions and in reliance on an opinion of the Attorney General the method of dealing with community income which has prevailed in seven States, with the possibility that, in the end, the courts would not agree with our views, would produce the utmost confusion and create an intolerable situation.

On the other hand, so long as the former opinions referred to are allowed to stand, they interfere with your taking any steps to have these questions determined in the courts, and it must be admitted that the decision in *United States v. Robbins* has raised very substantial doubt as to the soundness of the two opinions.

The questions involved are not such as may appropriately be set at rest by congressional action. As the nature and extent of a wife's interest in community income are matters determined by the laws of the States, Congress may not by any enactment change the nature of the wife's interest; and as the problem involved in not one of construction of the Revenue Acts of the United States, the rule that reenactment of a statute after an administrative construction of it is legislative adoption of the construction, has no application to this case. By section 1212 of the Revenue Act of 1926 Congress has indicated an intention to set these questions at rest, to some extent at least, for the period before January 1, 1925, but that enactment, the effect of which it is not necessary for me to consider now, is only in the nature of a statute of limitations and the limiting of its effect to the period before January 1, 1925, emphasizes the existence of the problem for the period after that date. If it be the fact that in some or all of these States in which a community property system prevails, the wife has no real ownership in community income during the existence of the community, an attempt by Congress to allow wives in those States to return part of the community income as their own, while in other States not having a community property system wives are not allowed to return any part of their husband's income, would raise serious questions under the uniformity provisions in the Constitution of the United States. The problems involved are therefore essentially of a kind which should be settled by the courts and which can not be set at rest in any other way.

For these reasons I feel constrained to, and do now, withdraw the two opinions referred to in order to leave you free, as has been done in similar situations, to arange for test cases in the courts or otherwise deal with the matter as you may think proper.

Respectfully submitted,

WILLIAM D. MITCHELL.
Acting Attorney General.

To the Secretary of the Treasury.

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CHARLES ELMORE CR
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Nos. 15, 106, 84, 86.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON,
v.
H. G. SEABORN.

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE,
v.
I. B. KOCH.

ON CERTIFICATES FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE,
Petitioner,
v.
C. W. BACON.

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE,
Petitioner,
v.
WILLIAM PFAFF.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM REGARDING THE LEGISLATIVE HISTORY OF THE REVENUE ACT OF 1926.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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Petitioner,

v.

WILLIAM PFAFF.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM REGARDING THE LEGISLATIVE HISTORY OF THE REVENUE ACT OF 1926.

I.

The revenue bill of 1926 was introduced in the House December 7, 1925.

Secs. 210-211 were identical with corresponding sections in all earlier revenue acts beginning with the Revenue Act of 1916 (including the Revenue Acts of 1921 and 1924, to which references are made in taxpayers' briefs).

The taxing language used in these sections had acquired, prior to 1926, a definite meaning opposed to the contentions of the Government in these cases. The incorporation of such language in the 1926 Act imported also into that act such construed meaning.

The taxing language used thereby definitely expressed the intent of Congress, in accordance with the repeated opinions of Attorneys General and Treasury Regulations five years old and still in effect, that in California and jurisdictions having similar laws the individual intended to be taxed on community income was the husband, since the wife had no real ownership interest therein; but that in the other community property states where the wife did have a real ownership interest in such income the husband was not taxable upon her said interest even though he had the powers of management, control and dominion, so called. The showing is affirmative that Congress had twice refused, notwithstanding official pressure, to change the law so as to tax the husband because of his control and administration for income the wife owned. No plainer showing of actual Congressional intent can be found. It is conclusive in this case unless the subsequent decision in the *Robbins* case as suggested by the government in argument compels this court to say that Congress must be presumed, notwithstanding its actual contrary intent, to have finally passed the bill purposing it to mean that in all cases the husband must

be taxed for the entire community income on some other theory.

The bill contained also Secs. 216 and 223, which dealt with exemptions of, and deductions by, married persons and with separate, joint and individual returns by the spouses. They appear in all revenue acts since the Revenue Act of 1918.

II.

The bill was referred to the Ways and Means Committee of the House and was reported back to the House by that Committee on December 7, 1925.

Secs. 210, 211, 216 and 223 were unchanged.

III.

The bill passed the House December 18, 1925.

No change was made or attempted to be made in Secs. 210, 211, 216 or 223.

IV.

The bill having reached the Senate was referred to its Finance Committee on December 21, 1925. It was reported back to the Senate by the Finance Committee on January 20, 1926, and the report printed under date of January 22, 1926.

Secs. 210, 211, 216 and 223 were unchanged.

V.

On February 12, 1926, while the bill was pending in the Senate, a retroactive amendment to it was offered by Senator Jones of Washington (one of the community property states whose laws are under examination in this case), and was adopted by the Senate, reading as follows:

"RETROACTIVE REGULATIONS"

"SEC. 1213. The liability of any taxpayer under any internal revenue law shall be determined (unless such taxpayer otherwise consents or requests) in accordance with the Treasury decisions, opinions of the Attorney General, and regulations made by the commissioner or the Secretary, or by the commissioner with the approval of the Secretary, in force at the time his return was made, whether such return was made before or after the enactment of this act. As used in this subdivision the term 'return' means, in the case of a return which has been amended, the return as finally amended."

VI.

On the same day (February 12, 1926) the bill was passed by the Senate.

Secs. 210, 211, 216 and 223 remained unchanged.

VII.

The House did not concur in the Senate changes and the bill was sent to joint conference on February 15, 1926.

VIII.

In joint conference, the language of the retroactive Jones amendment (Sec. 1213) was considered by the Treasury Department to be uncertainly broad and, at its suggestion, retroactive Secs. 1207 (invested capital), 1208 (installment sales), and 1212 (community property), formulated by it, were substituted. Sec. 1212 read as follows:

"SEC. 1212. Income for any period before January 1, 1925, of a marital community in the

income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse."

IX.

The report of the joint conference committee was called up in the House and the bill finally passed in the House on February 23, 1926, and in the Senate on February 24, 1926.

Secs. 210, 211, 216 and 223 remained unchanged.

X.

The act was approved and became a law on February 26, 1926.

Thus the sections of the Revenue Act of 1926, which contain all of the taxing language relied on by the Government in this case, remained unchanged throughout the legislative progress of the Act.

The revenue act in question was divided into twelve separate major divisions or titles. Title II dealt with the imposition of the income tax for the year 1925 and subsequent years. That title was a complete taxing act in itself. Secs. 210, 211, 216 and 223 are embodied in that title.

Sec. 1212 of the act was not a part of Title II. It was a part of Title XII, the final title of the act. In Title XII were contained various special administrative provisions which dealt principally, if not exclusively, with situations arising in prior years under

former revenue acts. In the main its sections threw no light upon the taxing provisions of Title II of the Act.

In the briefs of the Government (see e. g.—No. 15, Burns Poe, Collector, v. H. G. Seaborn (page 9 footnote)), the understanding of all parties to this litigation as to Sec. 1212 of the revenue act and the position of the Government in this litigation, with reference to that section, are thus stated by the Solicitor General:

> "This procedure" (the practice of divided returns in the community states of Washington, Texas, Louisiana, Arizona, Nevada, Idaho and New Mexico—the parenthesis is ours) "was subsequently given retroactive legislative approval as to 1925 and prior years by Sec. 1212 of the Revenue Act of 1926, *infra*, p. 46. That section was not intended to apply to taxes for subsequent years and *has no bearing on the question here involved.*" (Italics ours.)

and, in the brief of Solicitor General Mitchell, in *Zemurray v. United States,* 278 U. S. 600, filed in this court in opposition to an application for writ of certiorari (in which brief the Solicitor General took the position that no question of community income was involved, but only a question of compromise), Sec. 1212 was characterized "as evidencing the intention of Congress to accept and confirm the returns of community income made in community property states other than California, for periods prior to January 1, 1925" * * * and, "as having left open for determination in the courts the question of the right of the wife in each of these states to make separate return." Also, in his opinion to the Trea-

sury, of date July 16, 1927, Mr. Mitchell referred to Sec. 1212 as "in the nature of a statute of limitations".

XI.

The decision in *United States v. Robbins*, 269 U. S. 315, was handed down January 4, 1926.

XII.

Representative Green's verbal statement, perhaps not binding on any one, made when reporting the Revenue Act of 1926 to the House on behalf of the joint conference committee, declared that the various retroactive provisions in the 1926 Act (Secs. 1207, 1209, 1212, and possibly others) were included in the Act for the purpose of

> "closing up those cases on the basis of the settlement made by the taxpayer and in accordance with the rules under which the Treasury Department had been acting,—rules and regulations which the House itself had practically sanctioned, because it attempted to make no change in them believing them to be valid, to be enforcible and, on the whole, * * * to be the best one that could be enacted."

XIII.

The Treasury Department obviously believed that the decision in the *Robbins* case was applicable exclusively to California, and that it was consistent with its own previous regulations, which distinguished between tax incidence in California and in the other states because the Treasury Department made no changes in such regulations for many

months after the Robbins decision and the passage of the Act of 1926. It has continued to the present date its practice of distinguishing between California incomes and community incomes in the other community states.

XIV.

Acting Attorney General Mitchell, seventeen months after the Robbins decision, officially advised the Treasury Department that, in his opinion, the *Robbins* decision was based upon the California wife's want of "ownership" of so-called community income in that State. He intimated that it introduced no new taxing principle resting on some basis other than ownership. He advised test suits and declared that, in his opinion, the test suits would depend upon "ownership" of the questioned income under applicable local laws, and that such questions must be determined by local laws.

XV.

It is not likely that Congress, in the closing and hurried hours of completing such important legislation as the 1926 Revenue Act, which had been long pending before it, considered that the *Robbins* decision (which was rendered after the Revenue Act had taken a fixed form consistent with pre-existing and definitely construed revenue legislation), had the effect of introducing into the act an entirely new tax principle, and yet made no effort to adjust the act to the new principle. Especially is this true where it is now affirmatively shown that a most distinguished law officer of the government, after months

of study of the Revenue Act of 1926 and the effect of the *Robbins* case, apparently never conceived the decision to have such a revolutionary effect and when a great department of the government filled with experts in tax administration, evidently did not understand the *Robbins* case as having such an effect because the Treasury Department itself did not withdraw the opinions and regulations announcing a construction contrary to the government's contention in these cases but continued them in full effect and operation until long after the decision in the *Robbins* case and the passage of the Act of 1926 and, in fact, withdrew the opinions and regulations only at the time the present test cases were decided upon. It is no answer to say that Sec. 1212 was added, for Sec. 1212 had no prospective application. The attitudes of the law officer of the Government and its tax department were not casual or unofficial, but were evidenced by official opinions, the continuation of existing regulations, innumerable rulings, etc.

XVI.

Such considerations foreclose the contention of the Government, made for the first time in these test cases, that solely because of the Robbins decision, Congress intended the 1926 Act to tax incomes in community states upon some theory of so-called "dominion", or "control", or "exclusive enjoyment", or "unfettered command" or any other theory than that of ownership (even if any such theory, distinct from ownership, could be maintained and applied to

the situations presented in the records in these cases before this court).

Respectfully submitted,

RHODES S. BAKER,
GEORGE DONWORTH,
CHARLES E. DUNBAR, JR.,
R. C. FULBRIGHT,
PALMER HUTCHESON,
MONTE M. LEMANN,
CLIFTON MATHEWS,
BLAINE B. SHIMMEL,
HARRY C. WEEKS,

October 25, 1930.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 15—October Term, 1930.

Burns Poe, Collector of Internal Revenue for the District of Washington, *vs.* H. G. Seaborn.	On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[November 24, 1930.]

Mr. Justice Roberts delivered the opinion of the Court.

Seaborn and his wife, citizens and residents of the State of Washington, made for the year 1927 separate income tax returns as permitted by the Revenue Act of 1926, c. 27, § 223 (U. S. C. App., Title 26, § 964).

During and prior to 1927 they accumulated property comprising real estate, stocks, bonds and other personal property. While the real estate stood in his name alone, it is undisputed that all of the property real and personal constituted community property and that neither owned any separate property or had any separate income.

The income comprised Seaborn's salary, interest on bank deposits and on bonds, dividends, and profits on sales of real and personal property. He and his wife each returned one-half the total community income as gross income and each deducted one-half of the community expenses to arrive at the net income returned.

The Commissioner of Internal Revenue determined that all of the income should have been reported in the husband's return, and made an additional assessment against him. Seaborn paid under protest, claimed a refund, and on its rejection, brought this suit.

The District Court rendered judgment for the plaintiff (32 Fed. (2d) 916); the Collector appealed, and the Circuit Court of Appeals certified to us the question whether the husband was bound to report for income tax the entire income, or whether the spouses were entitled each to return one-half thereof. This Court ordered the whole record to be sent up.

The case requires us to construe Sections 210 (a) and 211 (a) of the Revenue Act of 1926 (U. S. C. App., Tit. 26, §§ 951 and 952), and apply them, as construed, to the interests of husband and wife in community property under the law of Washington. These sections lay a tax upon the net income of every individual.[1] The Act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income. The use of the word "of" denotes ownership. It would be a strained construction, which, in the absence of further definition by Congress, should impute a broader significance to the phrase.

The Commissioner concedes that the answer to the question involved in the cause must be found in the provisions of the law of the State, as to a wife's ownership of or interest in community property. What, then, is the law of Washington as to the ownership of community property and of community income including the earnings of the husband's and wife's labor?

The answer is found in the statutes of the State,[2] and the decisions interpreting them.

These statutes provide that, save for property acquired by gift, bequest, devise or inheritance, all property however acquired after marriage, by either husband or wife, or by both, is community property. On the death of either spouse his or her interest is subject to testamentary disposition, and failing that, it passes to the issue of the decedent and not to the surviving spouse. While the husband has the management and control of community personal property and like power of disposition thereof as of his separate personal property, this power is subject to restrictions which are inconsistent with denial of the wife's interest as co-owner. The wife may borrow for community purposes and bind the community property (*Fielding* v. *Ketler,* 86 Wash. 194). Since the husband may not discharge his separate obligation out of community property, she may, suing alone, enjoin collection of his separate debt out of community property (*Fidelity & Deposit Co* v. *Clark,* 144 Wash. 520). She may prevent his making sub-

[1]The language has been the same in each act since that of February 24, 1919, 40 Stat. 1057.

[2]Remington's Compiled Statutes, 1922, Sections 181; 182; 570; 989; 1145; 1342; 1419; 6890 to 6896, inc.; 6900 to 6906; 6908; 7348; 7598; 10572; 10575; 10577 and 10578.

stantial gifts out of community property without her consent (*Parker* v. *Parker*, 121 Wash. 24). The community property is not liable for the husband's torts not committed in carrying on the business of the community (*Schramm* v. *Steele*, 97 Wash. 309).

The books are full of expressions such as "the personal property is just as much hers as his" (*Marston* v. *Rue*, 92 Wash. 129); "her property right in it (an automobile) is as great as his" (92 Wash. 133); "the title of one spouse . . . was a legal title as well as that of the other" (*Mabie* v. *Whittaker*, 10 Wash. 663).

Without further extending this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both. A description of the community system of Washington and of the rights of the spouses, and of the powers of the husband as manager, will be found in *Warburton* v. *White*, 176 U. S. 484.

The taxpayer contends that if the test of taxability under Sections 210 and 211 is ownership, it is clear that income of community property is owned by the community and that husband and wife have each a present vested one-half interest therein.

The Commissioner contends, however, that we are here concerned not with mere names, nor even with mere technical legal titles; that calling the wife's interest vested is nothing to the purpose, because the husband has such broad powers of control and alienation, that while the community lasts, he is essentially the owner of the whole community property, and ought so to be considered for the purposes of Sections 210 and 211. He points out that as to personal property the husband may convey it, may make contracts affecting it, may do anything with it short of committing a fraud on his wife's rights. And though the wife must join in any sale of real estate, he asserts that the same is true, by virtue of statutes, in most States which do not have the community system. He asserts that control without accountability is indistinguishable from ownership, and that since the husband has this, quoad community property and income, the income is that "of" the husband under Sections 210-211 of the income tax law.

We think in view of the law of Washington above stated this contention is unsound. The community must act through an agent.

This Court has said with respect to the community property system (*Warburton* v. *White,* 176 U. S. 494) that "property acquired during marriage with community funds became an acquêt of the community and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community."

In that case, it was held that such agency of the husband was neither a contract nor a property right vested in him, and that it was competent to the legislature which created the relation to alter it, to confer the agency on the wife alone, or to confer a joint agency on both spouses, if it saw fit,—all without infringing any property right of the husband. See, also, *Arnett* v. *Reade,* 220 U. S. 311 at 319.

The reasons for conferring such sweeping powers of management on the husband are not far to seek. Public policy demands that in all ordinary circumstances, litigation between wife and husband during the life of the community should be discouraged. Law-suits between them would tend to subvert the marital relation. The same policy dictates that third parties who deal with the husband respecting community property shall be assured that the wife shall not be permitted to nullify his transactions. The powers of partners, or of trustees of a spendthrift trust, furnish apt analogies.

The obligations of the husband as agent of the community are no less real because the policy of the State limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. The law's investiture of the husband with broad powers, by no means negatives the wife's present interest as a co-owner.

We are of opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife.

We should be content to rest our decision on these considerations. Both parties have, however, relied on executive construction and the history of the income tax legislation as supporting their respective views. We shall, therefore, deal with these matters.

The taxpayer points out that following certain opinions of the Attorney General,[3] the Decisions and Regulations of the Treasury have uniformly made the distinction that while under California law the wife's interest in community property amounts to a mere expectancy contingent on her husband's death and does not rise to the level of a present interest, her interest under the laws of Washington, Arizona, Texas and some other states is a present vested one. They have accordingly denied husband and wife the privilege of making separate returns of one-half the community income in California, but accorded that privilege to residents of such other states.[4]

He relies further upon the fact that Congress has thrice,[5] since these Decisions and Regulations were promulgated, re-enacted the income tax law without change of the verbiage found in §§ 210 (a) and 211 (a), thus giving legislative sanction to the executive construction. He stands also on the fact that twice the Treasury has suggested the insertion of a provision,[6] which would impose the tax on the husband in respect of the whole community income, and that Congress has not seen fit to adopt the suggestion.

On the other hand the Commissioner says that, granted the truth of these assertions, a different situation has been created as respects 1926 and subsequent years. For in the 1926 Act there was inserted a section which plainly indicated an intent to leave this

[3]Opinion of Attorney General Palmer, September 10, 1920, (32 Op. A. G., 298); Opinion of Attorney General Palmer, February 26, 1921 (32 Op. A. G., 435).

The Opinion of Attorney General Stone, of October 9, 1924 (34 Op. A. G., 395), and his letter of January 27, 1925, referring thereto (See T. D. 3670) deal only with estate tax, and express no opinion on the question here involved.

See Opinion of Acting Attorney General Mitchell of July 16, 1927, as a result of which this and other suits were initiated (35 Op. A. G., 265).

[4]O. D. 426, April, 1920; T. D. 3071, August 24, 1920; T. D. 3138, March 3, 1921; Regulations 62, Art. 31, 1921 Revenue Act.

[5]Act of November 23, 1921, 42 Stat. 227; Act of June 2, 1924, 43 Stat. 253; Act of February 26, 1926, 44 Stat. 9.

[6]The provision desired by the Treasury was as follows: "Income received by any community shall be included in the gross income of the spouse having management and control of the community property." This clause was in the 1921 Act as passed by the House. It was stricken out in the Senate. When the 1924 Act was introduced it contained the same provision, which was stricken out by the Ways and Means Committee and not re-inserted.

question open for the future in States other than California, while closing it for past years. The section is copied in the margin.[7]

We attribute no such intent to the section as is ascribed to it by the Commissioner. We think that although Congress had twice refused to change the wording of the Act, so as to tax community income to the husband in Washington and certain other states, in view of our decision in *United States* v. *Robbins*, 269 U. S. 315 it felt we might overturn the executive construction and assimilate the situation in Washington to that we had determined existed in California. Section 1212 therefore was merely inserted to prevent the serious situation as to resettlements, additional assessments and refunds which would follow such a decision.

The same comments apply to the Joint Resolution No. 88, 71st Congress, on which the Commissioner relies.[8]

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[7]SEC. 1212. Income from any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. Supp. II. Title 26, Sec. 964a.)

[8]That the three-year period of limitation provided in section 277 of the Revenue Act of 1926 upon the assessment of income taxes imposed by that Act for the taxable year 1927, and the three-year period of limitation provided in section 284 of the Revenue Act of 1926 in respect of refunds and credits of income taxes imposed by that Act for the taxable year 1927 shall be extended for a period of one year in the case of any married individual where such individual or his or her spouse filed a separate income-tax return for such taxable year and included therein income which under the laws of the State upon receipt became community property.

SEC. 2. The two-year period of limitation provided in section 275 of the Revenue Act of 1928 upon the assessment of income taxes imposed by Title I of that Act for the taxable year 1928, and the two-year period of limitation provided in section 322 of the Revenue Act of 1928 in respect of refunds and credits of income taxes imposed by that Act for the taxable year 1928 shall be extended for a period of one year in the case of any married individual where such individual or his or her spouse filed a separate income-tax return for such taxable year and included therein income which under the laws of the State upon receipt became community property.

SEC. 3. The periods of limitations extended by this joint resolution shall, as so extended, be considered to be provided in sections 277 and 284 of the Revenue Act of 1926 and sections 275 and 322 of the Revenue Act of 1928, respectively.

SEC. 4. Nothing herein shall be construed as extending any period of limitation which has expired before the enactment of this joint resolution.

It is obvious that this resolution was intended to save the Government's right of resettlement, in event that the proposed test suits, of which this is one, should be decided in favor of the Government's present contention. See the Report of the Ways and Means Committee on the resolution (Cong. Record, June 11, 1930, pp. 10923-10925).

On the whole, we feel that, were the matter less clear than we think it is, on the words of the income tax law as applied to the situation in Washington, we should be constrained to follow the long and unbroken line of executive construction, applicable to words which Congress repeatedly reemployed in acts passed subsequent to such construction, (*New York* v. *Illinois*, 278 U. S. 367; *National Lead Co.* v. *United States*, 252 U. S. 140; *United States* v. *Farrar*, 281 U. S. 624), reenforced, as it is, by Congress' refusal to change the wording of the Acts to make community income in states whose law is like that of Washington returnable as the husband's income.

The Commissioner urges that we have, in principle, decided the instant question in favor of the Government. He relies on *United States* v. *Robbins*, 269 U. S. 315; *Corliss* v. *Bowers*, 281 U. S. 376, and *Lucas* v. *Earl*, 281 U. S. 111.

In the *Robbins* case, we found that the law of California, as construed by her own courts, gave the wife a mere expectancy and that the property rights of the husband during the life of the community were so complete that he was in fact the owner. Moreover, we there pointed out that this accorded with the executive construction of the Act as to California.

The *Corliss* case raised no issue as to the intent of Congress, but as to its power. We held that where a donor retains the power at any time to revest himself with the principal of the gift, Congress may declare that he still owns the income. While he has technically parted with title, yet he in fact retains ownership, and all its incidents. But here the husband never has ownership. That is in the community at the moment of acquisition.

In the *Earl* case a husband and wife contracted that any property they had or might thereafter acquire in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, "shall be treated and considered and hereby is declared to be received held taken and owned by us as joint tenants . . .". We held that assuming the validity of the contract under

local law, it still remained true that the husband's professional fees, earned in years subsequent to the date of the contract, were his individual income, "derived from salaries, wages, or compensation for personal services" under §§ 210, 211, 212 (a) and 213 of the Revenue Act of 1918. The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, because here, by law, the earnings are never the property of the husband, but that of the community.

Finally the argument is pressed upon us that the Commissioner's ruling will work uniformity of incidence and operation of the tax in the various states, while the view urged by the taxpayer will make the tax fall unevenly upon married people. This argument cuts both ways. When it is remembered that a wife's earnings are a part of the community property equally with her husband's, it may well seem to those who live in states where a wife's earnings are her own, that it would not tend to promote uniformity to tax the husband on her earnings as part of his income. The answer to such argument, however, is, that the constitutional requirement of uniformity is not intrinsic, but geographic. *Billings* v. *United States,* 232 U. S. 261; *Head Money Cases,* 112 U. S. 580; *Knowlton* v. *Moore,* 178 U. S. 41. And differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity. *Florida* v. *Mellon,* 273 U. S. 12.

The District Court was right in holding that the husband and wife were entitled to file separate returns, each treating one-half of the community income as ~~their~~ his or her respective incomes, and its judgment is

Affirmed.

The CHIEF Justice and Mr. Justice STONE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 106—October Term, 1930.

Fred O. Goodell, Collector of Internal Revenue for the District of Arizona, *vs.* I. B. Koch.	On certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[November 24, 1930.]

Mr. Justice Roberts delivered the opinion of the Court.

This cause presents the same question as respects the return for taxation of community income of a husband and wife, citizens of Arizona, as was presented in No. 15 affecting spouses who are citizens of the State of Washington.

Here Koch and his wife filed separate returns for 1927 each returning one-half of the community income; the Commissioner of Internal Revenue assessed a deficiency on the theory that Koch alone should have returned the entire income; Koch paid under protest, and brought suit against the Collector in the District Court to recover the sum so paid. The Collector demurred. Judgment went for plaintiff. The Collector appealed to the Circuit Court of Appeals, which certified questions to us. This Court ordered the entire record sent up.

What we said in No. 15 applies here, if under the law of Arizona, the wife's interest in community property is, in legal effect, the same as in Washington.

The collector asserts that the Arizona law of community property closely resembles that of California (cf. *U. S.* v. *Robbins*, 269 U. S. 315); but concedes that in many respects its provisions are similar to those of the law of Washington.

We have examined the statutes* and authorities cited, and have concluded that they present no significant differences from the

*The applicable provisions (cited from the Revised Statutes of 1913 which were in force in 1927) are Title 6, Sections 403-405; 865-869; 1102. Title 8, Sections 2058-2062. Title 32, Sections 3848-3856; 3865-3869; 3881-3886. Act of February 10, 1921, Ariz. Session Laws, Regular, p. 6. Act of March 17, 1919, Arizona Session Laws, Regular, p. 98.

Washington system. In *La Tourette* v. *La Tourette,* 15 Ariz. 200, is was said: "The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal." As in Washington, each spouse has unlimited testamentary power over his or her interest in the community, and upon failure to exercise it, such interest passes to the descendants of the decedent.

The Arizona Supreme Court has likened the community to a partnership. *Forsythe* v. *Paschal,* 34 Ariz. 380. The husband as agent may not act in fraud of his wife's rights, and if he attempts to do so, she has a remedy in the courts. *Gristy* v. *Hudgens,* 23 Ariz. 339.

Enough has been said to show that our conclusion in No. 15 holds here, and that the wife has such equal interest in community income as to entitle her to treat one-half thereof as her income, and file a separate return therefor under sections 210(a) and 211(a) of the Revenue Act of 1926.

Perhaps we ought also to note that what is said in No. 15 with respect to executive construction and legislative history applies in this case.

For the reasons above given, and more fully stated in the opinion in No. 15, the judgment of the District Court is

Affirmed.

The CHIEF Justice and Mr. Justice STONE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1930.

George C. Hopkins, Collector of Internal Revenue for the Second District of Texas,
vs.
C. W. Bacon.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 24, 1930.]

Mr. Justice Roberts delivered the opinion of the Court.

This case comes here on writ of certiorari to the Circuit Court of Appeals of the Fifth Circuit. It involves the same questions with respect to community income under Texas law as are involved in Nos. 15 and 106 under the law of Arizona and Washington.

Respondent was assessed additional income tax for 1927, because he and his wife had made separate returns and had each returned one-half of the community income, whereas the Commissioner of Internal Revenue asserted that the respondent must return the whole thereof. Respondent paid under protest, brought suit in the District Court (27 Fed. (2d) 140) and recovered judgment. The collector appealed and the Circuit Court of Appeals affirmed the judgment. (38 Fed. (2d) 651.)

In view of our decision in No. 15, the only matter to be examined here is whether under the community property system of Texas the wife has a mere expectancy, as she would under the law of California (cf. *United States* v. *Robbins*, 269 U. S. 315), or on the contrary has a proprietary vested interest in the community property such as makes her an owner of one-half of the community income.

The statutes contain sweeping provisions as to what shall be included in community property. They provide that each spouse shall have testamentary power over his or her respective interest in the community property. In the event of failure to exercise such testamentary power they provide that the property shall go in the first instance to the descendants of the deceased spouse.

They provide, as is usual in States having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it were his own. In spite of this, however, it is settled that in Texas the wife has a present vested interest in such property (*Arnold* v. *Leonard,* 114 Tex. 535). Her interest is said to be equal to the husband's (*Wright* v. *Hays,* 10 Tex. 130). It is held that the spouses' rights of property in the effects of the community are perfectly equivalent to each other (*Arnold* v. *Leonard, supra*). These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts. (*Stramler* v. *Coe,* 15 Tex. 211; *Martin* v. *Moran,* 32 S. W. 904; *Watson* v. *Harris,* 130 S. W. 237; *Davis* v. *Davis,* 186 S. W. 775.)

The applicable statutory provisions are noted in the margin.*

In view of what has been said in No. 15, it remains only to say that the interest of a wife in community property in Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband, and that one-half of the community income is therefore income of the wife. She and her husband are entitled to make separate returns, each of one-half of such income. The judgment of the Circuit Court of Appeals is

Affirmed.

The CHIEF Justice and Mr. Justice STONE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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*Revised Civil Statutes, Texas, 1925, Vols. I, II, Articles 1299-1300; 1983-1985; 2578-2579; 3661-3664; 3666-3670; 3672-3678; 3680-3681; 4613-4627; 4634-4635; 4638. Texas General and Special Laws, Reg. Sess. 1927, Chap. 148.

SUPREME COURT OF THE UNITED STATES.

No. 86—October Term, 1930.

Jacob O. Bender, Collector of Internal Revenue for the District of Louisiana, *vs.* William Pfaff.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 24, 1930.]

Mr. Justice Roberts delivered the opinion of the Court.

The question presented in this case is the same as that dealt with in Nos. 15, 84 and 106. The only variant is that here we are concerned with the community property law of Louisiana. The case comes here on certiorari to the Fifth Circuit Court of Appeals, which affirmed (38 Fed. (2d) 649) a judgment of the District Court (38 Fed. (2d) 642) in favor of the respondent, whereby respondent recovered the amount of an additional assessment paid under protest. As in the other cases the Commissioner made this additional assessment on the theory that under the law of Louisiana the whole community income is to be treated as the income of the husband.

If the test be, as we have held it is, ownership of the community income, this case is probably the strongest of those presented to us, in favor of the wife's ownership of one-half of that income. The relevant statutes of Louisiana are noted in the margin.* So called "common property" includes all property acquired in any manner

*La. Revised Civil Code, 1870, Articles 57, 64, 120-121, 128, 131-132, 149-150, 155-156, 159-160 (as amended by Act 247 of 1916, p. 521; 915 (as amended by Act 160, 1920, p. 250); 917, 2332, 2334 (as amended by Act 186, 1920, p. 304); 2383, 2386, 2392-2401, 2402 (as amended by Act 68 of 1902, p. 95); 2403, 2404 (as amended by Act 96 Reg. Sess. 1926, p. 136); 2405-2409, 2410 (as amended by Act 4 of 1882, p. 5); 2411-2414, 2417-2419, 2421-2425, 2430; La. Code of Practice, 1870, Articles 105-107, 298; Act 102 of 1916, p. 223; Act 132 Reg. Sess. 1926, p. 207.

by husband and wife during marriage except donations made to one of the spouses, and except the wife's earnings and actions for damages when she is living apart from her husband, or carrying on a separate business or trade. The statutes speak of a marriage superinducing as a matter of right, "partnership or community" of acquêts or gains. Repeatedly the statutes refer to the relation as a "partnership or community". The decisions of the Supreme Court of Louisiana clearly recognize the wife's ownership of one-half of all the community income. They unequivocally declare that the wife's half interest in such community property "is not a mere expectancy during the marriage". (*Phillips* v. *Phillips*, 160 La. 813.)

As in the case of other states, whose law we have discussed in connection with this matter in No. 15, No. 106 and No. 84, each spouse may by will dispose of only his or her one-half of the community and is powerless to affect the other's half. In case of death intestate one-half descends to the heirs of the decedent, and the other spouse is powerless to prevent this.

While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many states which have a community system. In Louisiana, if the husband proves, by reason of financial difficulties or the like, an unfit manager, the wife may bring about an immediate dissolution and liquidation of the community property. (*Wolf* v. *Lowry*, 10 La. Ann. 272; *Webb* v. *Bell*, 24 La. Ann. 75; *Brown* v. *Smythe*, 40 La. Ann. 325.) And when the wife sues for a separation of the property she is entitled to an accounting from the husband for community income or property in his hands and to reimbursement and retribution for any act done by him in fraud of her rights. (*Hill* v. *Hill*, 115 La. 489; *White* v. *White*, 159 La. 1065.)

In conclusion it may be noted that the Supreme Court of Louisiana has cited our own decisions in *Warburton* v. *White*, 176 U. S. 484, and *Arnett* v. *Reade*, 220 U. S. 311, indicating that the exposition of the wife's rights and of the nature of the community therein contained correctly states the Louisiana doctrine.

Inasmuch, therefore, as, in Louisiana, the wife has a present vested interest in community property equal to that of her husband,

we hold that the spouses are entitled to file separate returns, each treating one-half of the community income as income of each "of" them as an "individual" as those words are used in §§ 210 (a) and 211 (a) of the Revenue Act of 1926.

The judgment of the Circuit Court of Appeals is

Affirmed.

The CHIEF Justice and Mr. Justice STONE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.